SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 154

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,

Petitioner,

versus

THE REPUBLIC OF CHINA,
CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED,

and

THE UNITED STATES OF AMERICA,

Respondents.

(SEVEN SUITS CONSOLIDATED FOR TRIAL)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner (National Union Fire Insurance Company of Pittsburgh, Pennsylvania, as War Risks Insurer of the seven Chinese steamships hereinafter mentioned), on its own behalf and also on behalf of

its war risks reinsurers,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case consisting of seven suits consolidated for trial.

Citation of Opinions Below

The opinion of the Court of Appeals (Circuit Judge Soper) is reported in 254 F. (2d) 177 and is also printed as Appendix A hereof. References thereto will be made herein as "p. A—, infra".

The opinion of the District Court (Chief Judge Thomsen) is reported in 151 F. Supp. 211. It is printed at pp. 4-54, inclusive, of the white covered Record filed herewith. Reference to that opinion will be identified as "Thomsen, R.—."

The District Court's Findings of Fact relative to the six vessels at Hong Kong are to be found at pp. 66-142, inclusive, of the white-covered Record (hereinafter referred to merely as R.) filed herewith under the provisions of paragraph 4 of Rule 21. Those numbered 101-175, which were designated by the Court as pertaining solely to the case relating to the S. S. "Hai Hsuan", are to be found at pp. 103a-120a, inclusive, of the blue-covered Record (hereinafter referred to as blue R.) similarly filed herewith.

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[1] As the District Court pointed out, the re-insurers on the war risks policies here involved and under which it allowed recovery (Thomsen, R. 46) are different from those re-insuring the marine risks in these cases.

Jurisdiction

The judgment of the Court of Appeals was entered on April 8, 1958. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254(1).

Questions of Law Presented

I.

When, as a consequence of civil war, a merchant vessel in the possession of one of the warring governments is taken over into the possession of the other government, through the action of her Master and/or officers and crew, who (in conspiratorial concert with shore personnel and paid agents and pursuant to the announced policy of the revolutionary government) raise the revolutionary flag, is such a taking a "seizure" within the meaning of that term in a modern policy against war risks?[2]

II.

When, during a civil war, "public functionaries" (Fdg. 14, R. 70) in the employ of one of the govern-

[2] It is well settled that a loss by, or in consequence of, "seizure" (other than under customs or quarantine regulations or legal process) comes within the standard F. C. & S. (Free of Capture and Seizure) Clause (R. 240) and is thus ordinarily recoverable under the standard war risks cover. (*Standard Oil Co.* v. *U. S.*, 267 U. S. 76, at p. 79; and cases cited.) While the war risk policies in the instant cases, as initially issued, were in the standard form, the extent of the coverage thereunder was later restricted by the addition, only a few months prior to these losses, of a special typewritten clause "Excluding Capture and Seizure" (R. 242). The basic questions as to the general scope of war risk coverage here presented are, however, not directly affected by this special clause, see pp. 7-8, below, as to the reasons for its being added.

ments as Master and/or officers and crew of a state-owned, government-operated merchant vessel, take over in a foreign port control of the vessel as Agents for the other government, which is recognized at that time and in that port as the *de jure* government of the state engaged in civil war and which thereafter ratifies and adopts the benefit of their acts on its behalf, do such acts by the Master and/or officers and crew constitute "barratry"?[3]

III.

When, aside from the foregoing situation, but still as a "consequence of civil war," persons cease to act as Masters and/or crew in the employ of one of the warring Governments and change their roles to that of agents for the other Government, which has become the government in complete control of their domicile and/or that of their families, do their acts, in their changed role, in thereafter holding control of the vessel for the benefit of the latter government which ratifies their acts and thereby comes into the possession of the vessel, establish a loss by "barratry" to the exclusion of its being a loss by "seizure" within the scope of war risks coverage?

IV.

(a) Are the terms "barratry" and "seizure" mutually exclusive or can there be a "barratrous

[3] Fairly comprised within this question is the issue as to whether the lower courts erred in rejecting petitioner's contentions based on the principle that "the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it." *Guaranty Trust Co. v. United States*, 304 U. S. 126, at p. 137. The legal effect of this principle in relation to barratry is discussed at p. 33 below.

seizure" as a "consequence of civil war" within the meaning of the term "seizure" in modern policies insuring against war risks?

(b) Does "barratry", a generally accepted marine risk, restrict the risk of "seizure" assumed under a separate war risks policy?

V.

Should the doctrine and/or dicta of a 94-year-old State Court case,[4] construing a marine insurance policy and never previously cited by any Court with reference to any of the issues involved in the cases at bar, be applied in determining the extent of coverage under a modern war risks policy under the circumstances here present?

Statement of the Case

All seven suits were instituted on the admiralty side of the U. S. District Court for the District of Maryland on policies of hull insurance issued by your petitioner in respect of certain vessels therein named. The subject-matter of each action thus was clearly a maritime contract (*Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310) and, consequently, within the admiralty and maritime jurisdiction of the court of first instance (28 U. S. C., Sec. 1331) as well as of this Honorable Court (Art. III, Sec. 2, of the Constitution).

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[4] *Greene* v. *Pacific Mut. Ins. Co.*, 91 Mass. 217 (1864), involving a South Seas mutiny and desertion by some members of the crew of a whaling ship.

The libellants in each of the actions were the same, namely: (i) The Republic of China (as represented by the Chinese Nationalist Government headed by Chiang-Kai-Shek), to which the United States, as part of its post-war aid to that country, had "sold" these (and other) merchant vessels; (ii) China Merchants Steam Navigation Company, Ltd., a corporation specially organized for the purpose of operating merchant vessels under the general control of the Ministry of Communications of the Republic of China; and (iii) The United States of America, by reason of its interest in the unpaid balances[5] due under purchase-money mortgages on the vessels which were declared to be in default on January 17, 1950, i. e. the day after the Communist flag was run up on the vessels at Hong Kong.

Each vessel was insured under a marine risk policy and also under a separate war risk policy. While both sets of policies were issued by your petitioner, the war risk re-insurers are different from those re-insuring the marine risks (Thomsen, R. 46). The libels (R. 54-61) declared under both types of policy, but made no election as to whether recovery should be allowed under the marine or under the war risks policies.

The Perils Clause (R. 240) of the marine cover is in the customary form as adopted at Lloyds in 1779 and as incorporated in the "First Schedule" of the English Marine Insurance Act of 1906, "excepting, however, such of the foregoing Perils as may be

[5] Totalling U. S. $1,313,480, exclusive of accrued interest (Thomsen, R. 7). The vessels were valued and insured for a total of U. S. $3,016,825 (Thomsen, R. 9).

excluded by provisions elsewhere in this Policy" (R. 240). One of "the foregoing Perils" specifically enumerated is "Barratry of the Master and Mariners" (R. 240). But it, along with the other risks therein named, is expressly subject to the qualifying effect of the detailed terms of the modern standard form of F. C. & S. (Free of Capture and Seizure) Clause or Warranty which excludes not merely "seizure" (R. 240), but also, *inter alia*, "the consequences of civil war" (R. 241) from the scope of the coverage otherwise afforded by the broad Perils Clause of the marine cover.

War risks policies, in contrast, represent a special form of limited coverage of comparatively recent origin and still evolving in its scope and terms. Basically they cover "only those risks which would be covered by the" standard marine policy "in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty" (R. 241). The more modern form, such as those here involved, includes an additional, or explanatory, Perils Clause (R. 241) specifically enumerating "civil war, revolution, rebellion or insurrection or civil strife arising therefrom" and certain other named risks of a warlike nature. "Barratry", however, is not mentioned. In other words, a loss by barratry is covered by the war risks policy only to the extent it is excluded from the marine policy by being due to a cause specifically enumerated in the F. C. & S. warranty.

The coverage afforded by the war risks policies on these seven vessels, as originally issued in 1946-1947, was standard in scope; in other words, "capture and seizure" were among the perils insured against. As is customary, they contained trading warranties which

were modified from time to time as the Communist forces, driving down from the North, took over control of more and more ports on the Chinese mainland.[6] At the time (April, 1949) the retreating Nationalist Government moved its capital from Nanking to Canton, the warranties had been modified so as to exclude "the Baltic Sea, Black Sea and China north of Amoy". Shortly thereafter (i. e. in June, 1949), your petitioner, considering the indirect and limited protection against the risk of loss of possession of the vessels to Communists afforded by that trading warranty to be inadequate, negotiated with the assured's brokers as a result of which there was added to the war risks policies a typewritten clause (R. 242) modifying the coverage by specifically "excluding capture and seizure".

The claims here made, and in respect of which recovery has been allowed below, are for constructive total losses based directly and solely upon, and as a result of, loss of possession and control of the vessels to the Chinese Communist Government in January of 1950.

The circumstances under which those losses occurred may be summarized as follows:

The Six Vessels at Hong Kong

As of midnight, January 5/6, 1950, the British Government recognized the Communist Government headed by Chou En-lai as the *de jure* Government of

[6] At one time they read: "Warranted no voyage to ports in China not in control of the Government of the Republic of China". Even before the Nationalist Government finally withdrew completely to Formosa, there were no mainland ports remaining in its control.

the Republic of China and at the same time withdrew its former recognition of the Nationalist Government headed by Chiang-Kai-Shek, which, by then, was isolated on Formosa (Fdg. 25, R. 73).

On that date, six of the seven vessels here involved were lying idle in the port of the British Crown Colony of Hong Kong despite repeated urgings from the head office of China Merchants Steam Navigation Co., Ltd., on Formosa for the vessels to leave Hong Kong and proceed either to Formosa or to Japan. Failure to obey, however, does not afford any basis of recovery since it concededly caused no actual loss, but constituted, at the most, merely a barratrous delay (R. 207). The policies are "warranted free of any claim for delay * * *" (R. 242).

"On January 9, 1950 Premier Chou En-lai of the Central People's Government issued an order of the day, urging all personnel of political, diplomatic, financial, economic, cultural, educational and overseas Chinese affairs, organs of the 'former' Kuomintang Central and local government in Hong Kong to safeguard State property and archives, await the taking-over, and prevent 'reactionary' elements from stealing, destroying, removing and concealing them. Chou En-lai also promised rewards for those who safeguarded State property and punishment for those who engaged in stealing, destroying, removing or concealing State property" (Fdg. 234, R. 101).

The families of many, if not all, of the Masters, officers and crew were living at Shanghai or elsewhere on the mainland (Thomsen, R. 14), all of which was by then under the exclusive control of the Communist Government; and they probably would have suffered

retaliatory penalties if the vessels, being "State property",[7] had been "removed" to Formosa in violation of Chou-En-Lai's order. By reason of domicile, most, if not all, of the Masters, officers and crew had by that time become, by operation of law, citizens of the People's (Communist) Republic of China.

"On or about January 13, 1950, Manager Tong and most of the other employees" in the China Merchants office "at Hong Kong defected to the Communist Regime" (Thomsen, R. 13) and thereafter, having hoisted the Communist flag, issued orders to the Masters to do likewise (Fdg. 229, R. 98 and Thomsen, R. 15-16).

At all material times agents of the Communist Government were operating not only in Hong Kong, but also on board these vessels (Thomsen, R. 14).

"Up to January 15, 1950, each of said six vessels had been flying the flag of the Government of the Republic of China and of China Merchants Steam Navigation Company, Ltd. On or about January 16, 1950, personnel serving on each of said vessels combined and conspired with crews of the vessels, shore personnel and Communist agents to change, and on that date did change, the flag of the Government of the Republic of China, and flew in its place that of the Chinese Communist regime on each of said vessels" (Finding 228, R. 98).

"* * * the Chinese Communist flags that were placed on each Chinese vessel in the harbor were placed there by order of those employees of the Hong Kong branch office of the China Merchants Steam

[7] See *Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, 137.

Navigation Company, Ltd., who had defected" (Finding 229, R. 98).

"The change of flags was induced by arguments and pressures employed and exerted by Communist agents" (Thomsen, R. 16) in Hong Kong, "which, since the United Kingdom's recognition of the Chinese Communist Regime, had become a hotbed of Chinese Communist activities" (Fdg. 233, R. 101).

At the final argument in the District Court, Mr. Capone, the advocate for the two Chinese libellants, as a result of a recess conference with counsel for the United States as the other libellant, ultimately stated on the record:

> "The actual loss, we agree, occurred when the flags were hoisted" (R. 210-211).

The District Court found as a fact that "when the vessels in Hong Kong were lost by The Republic of China, they were lost to the Red regime" (Fdg. 235, R. 101).

The raising of the Chinese Communist flag was the outward and visible sign of assumption of control in the name, and for the use, of the Chinese Communist Government, which adopted and ratified their acts by thereafter paying their salaries and the wages of the crew and ultimately ordering the vessels to Canton (Fdg. 226, R. 97; see also Fdgs. 38 and 39, R. 78). That such acts operated to vest possession and exclusive control in the Chinese Communist Government, a *de jure* sovereign entity at the time and place (the British port of Hong Kong), seems indisputable (Fdg. 236, R. 101).

The "Hai Hsuan"

In several respects, the circumstances under, and by which, the Nationalist Government lost possession and control of this vessel differ from the situation just outlined as to the six vessels at Hong Kong.

One difference (and one which set in operation a chain of events) is that, at the time of official British recognition of the Chinese Communist Government and also at the time the Masters and crews of the vessels lying at Hong Kong assumed possession and control of them in the name, and for the use, of that Government, the "Hai Hsuan" was at sea en route with cargo from Spain, via the Suez Canal, to Japan. Her officers and crew learned of those events by BBC broadcasts. Such news, plus wireless orders from the Hong Kong office of CMSN on January 19th to put into Singapore and there await further orders (Fdg. 117, blue R. 106), "put ideas" into the heads of many of the officers and crew. They, like those at Hong Kong, had families in Shanghai and other places on the mainland then within control of the Chinese Communist Government. They were thus confronted with the problem as to what they should do under those circumstances and in view of the recently announced policy of that Government with regard to "State property" (see Fdg. 234, above quoted at p. 9). Their situation was aggravated by receipt of a message from the head office of CMSN for the vessel to change destination from Japan to Formosa. Compliance would have been directly contrary to the policy of the Government of their domicile and thus would have entailed self-exile as well as

probable retaliation against their families then living there.

Another distinction of even more importance in the development of events, was the continued loyalty of the vessel's Master to the Nationalist Government, pitifully ineffective though it proved to be in opposition to the pressure brought upon him by the Chief Engineer and the Chief Officer with the active support of the other officers and the crew. As the District Court pointed out:

> "If the testimony of Captain Hsueh is to be believed—and libelants, having produced him, are in no position to question it—the mutinous officers and crewmen on the 'Hai Hsuan' threatened violence to the captain, expressly or impliedly, and took the ship from his custody and control by the use or threat of superior force. They did not intend to use the ship for their own purposes, but acted as volunteers on behalf of the Communist Government in taking the ship into Singapore harbor, running up the red flag, and refusing to deliver the ship to Captain Paulsen. Whether or not this action was authorized by the Communist Government, or one of its agencies, it was ratified and adopted by the Communist Government" (Thomsen, R. 43).

Any possible doubt as to whether the actions of the officers and crew in taking over the "Hai Hsuan" from her Master and sailing her into Singapore contrary to his orders were merely mutinous and for their personal ends was completely removed by the fact that shortly after arrival at Singapore, to wit, "On about January 26, 1950, the flag of the Govern-

ment of the Republic of China was replaced on the 'Hai Hsuan' by a Chinese Communist Government flag which was provided by some Communist agent or sympathizer at Singapore, and which had not been on the ship during the voyage" (Fdg. 141—Blue R. 111a). See also the express Finding of Fact (139—Blue R. 110a-111a)

> "that the crew seized the 'Hai Hsuan' on behalf of the Central People's Government of the People's Republic of China as volunteers; and that 'since the 26th day of January I and the other officers and crew of the said steamer have been in continuous possession of the same for and on behalf of the said Government and have held ourselves and the ship at that Government's disposal. The wages of all the officers and men have been and are being paid by the said Honkong Office for an (sic) on behalf of the Central People's Government'."

See the ruling in *U. S.* v. *Yang Soon-Ee and Another* (*The Hai Hsuan*), (1950) 1 Malayan Law Rep. 63.

Rulings of the Lower Courts Herein

The District Court (Judge Thomsen) ordered entry of a decree allowing the libellants to recover a total of U. S. $2,995,270.87 in respect of the six vessels at Hong Kong, but dismissing the libel in the case of the "Hai Hsuan". This order was based on the following conclusions of law:

1. In respect of the six vessels at Hong Kong (i) that, "in running up the red flag" on January

16th, 1950, and thereafter "holding the ships for the Communist Government" of China, the Masters of these ships "were guilty of barratry"; (ii) that "these barratrous acts, which had the approval of most of the officers and crew of each ship, caused the constructive total loss of the vessels"; (iii) that "there was no seizure" of these vessels within the scope of the special clause in these particular war risks policies "Excluding Capture and Seizure" because (a) "there was no 'compelling force' to which the defecting masters, officers and crewmen were subject" and (b) exclusion of "seizure" in the special clause was ambiguous and ineffective in that it did not "say so explicitly" that it was intended "to exclude coverage for the barratrous acts of a master in changing sides in a civil war, running up the revolutionary flag and holding his ship for the other government"[8]; (iv) that although not excluded as "seizures", "the losses of the six Hong Kong vessels were covered by the war risk policies" since "the change of flags" was an act within "the terms 'consequences of civil war' " in the F. C. & S. Clause and also within the terms "risks of * * * civil war, revolution, rebellion, insurrection or civil strife arising therefrom" in the supplemental Perils Clause of the war risks policies.

2. In respect of the "Hai Hsuan" that "the loss was caused both by barratry and by seizure", the latter arising from the fact that "the mutinous officers and crewmen on the Hai Hsuan threatened violence to the captain expressly or impliedly, and took the

[8] The war risks policies nowhere mention or directly refer to "barratry" or "barratrous acts" as among the risks assumed.

ship from his custody and control by the use of threat of superior force", but, in so doing, "did not intend to use the ship for their own purposes, but acted as volunteers on behalf of the Communist Government" with such acts later "ratified and adopted by" it.

The District Court also rejected your petitioner's contentions (based on the doctrine re-affirmed by this Court in *Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, 137), as to the acts of the Masters and/or crew at Hong Kong not being "barratrous".

The Court of Appeals (opinion by Judge Soper) affirmed the District Court in respect of six vessels at Hong Kong, but reversed the dismissal of the libel in the "Hai Hsuan" case and remanded that case "for further proceedings in accordance with this opinion". After quoting at great length from the opinion in *Greene* v. *Pacific Mut. Ins. Co.*, 91 Mass. 217 (1864), Judge Soper wrote (i) that "according to recognized authority", i. e. the *Greene* case, supra, and its mention by some American text writers on the subject, "the term 'seizure' does not include a violent taking of possession of the ship by a mutinous crew" and, therefore, (ii) that "in this view of the law, which we accept, the liability of the insurance company", your petitioner here, "not only for the loss of the six Hong Kong ships but also for the loss of the Hai Hsuan is established". He also quoted from Judge Thomsen's opinion as setting forth "the correct approach to the problem" presented in connection with "barratry" by reason of the doctrine re-affirmed in *Guaranty Trust Co.* v. *U. S.*, supra, and in other later cases that rights of a foreign state

are vested in the national entity rather than in any particular Government.

Reasons for Granting the Writ

1. *The questions here involved are of basic importance in respect of the extent of coverage against war risks.*

What is comprised within the term "seizure" as a cause of loss within the coverage afforded by the use of that term in a policy insuring against war risks? To what extent, and with what effect, do concepts of "barratry" as a risk insured under marine policies carry over and apply in the field of war risk coverage? In short, when is "a seizure" of a vessel "not a seizure" within the scope of war risk coverage?

Manifestly, these questions are basic in the field of war risk insurance. "Seizure" is one of the major causes of loss excluded from the marine cover by the standard F. C. & S. Clause and thereby becomes one of the chief perils insured against by the terms of standard war risks policies in current use.

In the American market of today, the issuance of a marine policy on either ship or cargo without incorporating the standard F. C. & S. Clause would be a virtually unheard of event. It would require difficult and special arrangements, outside the customary channels, in order to secure proper re-insurance. Also, as a practical matter, such a departure from customary practice is unnecessary since the risks excluded by the F. C. & S. Clause are the exact risks

insured by the terms of the standard war risks policies.

While no actual statistics are available even as to the American market, it is obvious from the foregoing that literally thousands of hull policies, involving billions of dollars of insured values at risk, are presently, and will continue to be, outstanding. And, in respect of each of those policies, whether war or marine, the exact meaning of the term "seizure" is of basic importance.

It is, of course, true[9] that the amended F. C. & S. Clause adopted by British Underwriters in 1942 (see 1945 A. M. C. 1035) and the expanded American Hull F. C. & S. Clause of 1943 (see 1945 A. M. C. 1036) differ in the terms used in clarification of the coverage in respect of "consequences of hostilities or war-like operations." These changes in the British and American F. C. & S. Clauses did not, however, have any relation to the risk of "seizure" which remains a basic term specifically enumerated in both the British and the American forms and is left as one of the major risks within the standard war cover as currently issued here and abroad. Neither are losses by "seizure" within the scope of the war cover in the "Overall War-Marine Risk Settlement Agreement" of June 26, 1945. (See 1945 A. M. C. 1014-1035.)

Not only does the general importance of the several basic issues of law here presented seem patent from the foregoing; but it might also be noted that opposing

[9] *Standard Oil Co. v. U. S.*, 340 U. S. 54, note 10 at p. 59.

counsel (including counsel for the United States) are in agreement that

> "* * * the questions presented are of importance not only to the parties, but in the law of marine insurance."[10]

In short, the basic issues presented for review involve the proper interpretation of the modern form of F. C. & S. Clause and the standard clauses under which war risk coverage is granted both in this country and in England. Obviously, therefore, they present "a matter of more than individual concern": *Calmar S. S. Corp.* v. *Scott*, 345 U. S. 427, at p. 428.

2. *An authoritative solution of these legal questions is of direct concern to many interests other than the parties to these suits.*

The uncertainty and confusion in respect of relative coverages and liabilities arising from this decision by the Court of Appeals and its unprecedented extension of the doctrine of the *Greene* case, *supra*, to the field of war risk, could well result, if left unresolved, in an increase in the premium rates to be paid by vessel owners.

Also, since higher valuations are frequently declared and insured under war than under marine policies, it is important to the assureds, even aside from, and in addition to, those who insure their vessels against

[10] This quotation is taken from an application (signed by the proctors for all parties) to the Court of Appeals for leave to file longer briefs and to make more extended oral arguments than ordinarily permitted by the Rules of that Court.

war risks only, to know what losses by "seizure" come within the scope of the protection afforded them by their war risks policies.

The vital concern of vessel owners and hull underwriters in general with respect to the foregoing is obvious. In addition, other interests are directly and importantly concerned, for example,—as is illustrated in the cases at bar by the inclusion of the United States as a co-libellant—the holders of ship mortgages. The classes of interests so concerned will presumably increase as the trend indicated by recent public financing of ship construction and operation, is expanded.

Wholly aside from its immediate interest in this particular litigation by reason of the mortgages on these vessels held by the Maritime Administration and the Export-Import Bank, respectively, the United States has an important and even more vital interest in the proper interpretation and scope of the term "seizure" as used in the F. C. & S. Clause and thereby carried over as a risk specifically insured against by modern war risks policies. Its connection with that question arises because Congress has continued authority (46 U. S. Code Sec. 1281-1294) in the Secretary of Commerce to provide, under certain prescribed conditions, "insurance and re-insurance against loss or damage by war risks" with respect to American (and certain other) vessels, cargoes shipped thereon and similar maritime interests. It has also provided (Sec. 1281) that "the term 'war risks' includes to such extent as the Secretary may determine all or any part of those losses which are excluded from marine insurance coverage under a 'free of capture and seiz-

ure' clause, or analogous clauses". Manifestly, no proper determination can be made by the Secretary so long as there is uncertainty and conflict as to the meaning and scope of the term "seizure" in connection with war risk coverage.

3. *The need for this Court to review the instant cases is underscored by the fact that circumstances analogous to those which caused the constructive total losses of the vessels here involved are likely to recur at any time in the near future and result in losses of vessels of American and/or other registry.*

This court, presumably, will take judicial notice of the troubled and complex international situations which make war risk insurance protection presently necessary, apparently with little immediate prospect that they will change for the better in the near future. Likewise, it is common knowledge that more and more instances arise where a change of government, or of other political relations, is accomplished without recourse to actual hostilities. In short, the conflict and interaction of political allegiances due to conflicting political theories, evidenced by the occurrences which caused the loss of possession and control of these vessels to the opposing faction in the Chinese Civil War, are not unique, but presumably will recur so long as two powerful political ideologies are in active conflict.

Such, in general, are the varied interests involved. The need for this Court to resolve and authoritatively state the correct legal principles applicable to this

phase of war risks coverage, is heightened by the following factors:—

A.

"The questions involved in this case are novel and close."[11] *No direct precedents, either in the rulings of this Court or in the actual decisions of any other American Court, support the conclusions of law set forth in the opinion of the Court of Appeals herein.*

Strange as it may seem in view of the importance of the point, there actually is no precise authority in this country, not merely upon the basic proposition, but also upon the several subsidiary aspects fairly comprised therein. Accordingly, this Court should make an authoritative pronouncement as to the proper meaning of the key terms "seizure" and "barratry" in relation to situations such as, or analogous to, those here existent and their legal effect upon the nature and scope of war risks coverage.

As Chief Judge Thomsen pointed out in his opinion (R. 42): "No precedent has been cited or found in which the word 'seizure' has ever been held to cover or not to cover the case of a Master or mariners who defected to the opposite side in a civil war". See also the somewhat similar admission by Judge Soper (p. A14, infra). Actually, however, the question concerning whether or not there was a "seizure" is broader than as thus stated and embraces still other material factors which likewise have not been ruled upon in this country.

Similarly, on the point as to whether the circumstances here causing the loss can properly be deemed

[11] Judge Thomsen, R. 54.

to involve barratrous conduct, there is no prior decision (other than the rulings of Lord Wright in *The Minden,* infra) squarely in point. The descriptive passage in *The Jupiter No. 3*, 1927 Prob. 122, quoted and so heavily relied upon by both the District Court (Thomsen, R. 32-3) and by the Court of Appeal (p. A18, infra), is not an actual ruling that the Master's acts in allowing the Bolsheviks to gain possession of his vessel constituted barratry since that case was not an action on a policy, but merely a possessory action between private parties claiming title to the vessel from conflicting sources.

In considering whether "barratry" was involved in the cases at bar, it must be borne in mind that the acts which caused the losses[12] for which the libellants have been allowed to recover under the war risks policies[13] were not done by the Masters and/or crew either in their capacity as such or for their own purposes. They had changed their roles and their relationships to the vessel and were acting as agents for the Communist Government. Furthermore, if they had not continued to hold possession for, and in the name of that Government in a port where it was recognized as the *de jure* Government of China,

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[12] The Court of Appeals' opinion is vague as to exactly what barratrous conduct caused the loss. During final argument in the District Court, the advocate for the two Chinese libellants, as a result of a recess conference with counsel for the United States as the other libellant, had conceded that any actions at Hongkong prior to the hoisting of the Communist flags, had merely resulted in a "certain temporary" loss of "control" (R. 211) and/or "a barratrous delay" which concededly "is not covered" by the policies (R. 207). But no reference thereto is made by the Court of Appeals.

[13] As noted in more detail at pp. 31-32 below, "barratry" is not a risk directly named, or generically insured against, in such type of policies.

and, even more importantly, *if the Communist Government had not adopted and ratified the taking and holding of possession for its use*, the libellants could have recovered possession by legal process which would have been effective against a rebellious Master and/or crew claiming adverse possession. In short, these constructive total losses would not have occurred (but merely a temporary loss of control and, at most, a "barratrous delay", concededly not covered—R. 207) if the assumption of possession and control of these seven vessels for its benefit had not been ratified by the Chinese Communist Government.

In view of the foregoing, it is manifest that this claim of the libellants for a loss by "barratry of the Master and Mariners" falls far outside all previous definitions of that term and, in itself, presents a novel, but important, question of law on which this Court should rule.

It is, of course, true that the Court of Appeals (p. A13, *infra*) accepted "the law", as set forth in *Greene* v. *Pacific Mut. Ins. Co.*, 91 Mass. 217 (1864), in construing the terms of a marine policy, as completely and unqualifiedly applicable to the questions of law arising in this case in respect of liability under the war risks policies here involved.[14] A compara-

[14] The fact that it was a decision by a Massachusetts State Court has no governing significance. Your petitioner is a Pennsylvania corporation; neither the Republic of China (the named assured) nor any of the other parties has any connection with Massachusetts; the negotiations leading up to the issuance of the policies were conducted in New York where both the brokers for the assured and the marine agents for your petitioner were located; all of the policies were actually executed in Bermuda; the losses occurred in the port of Hong Kong and Singapore, respectively; the actions on the policies were instituted on the admiralty side of the Federal Court

tive analysis of the reasoning and rulings in support of the judgment holding the marine underwriters liable in the *Greene* case[15] discloses that they are not actually in point in determining the questions as to war risk coverage here involved.

The *Greene* case involved a mutiny by certain members of the crew of a whaling vessel against bad food and harsh discipline. On arrival at a port of refuge after being deserted by the mutineers, she was in such condition that the Court considered (p. 230 of 91 Mass.) "a verdict for a constructive total loss" would be justified. The Court had earlier (p. 223) taken care to point out that "the abandonment" to the underwriters in support of the owner's claim for a constructive total loss by perils insured against, i. e., specifically for a loss by barratry, "was not made while the ship was in the hands of the mutineers, but long afterwards, and subsequent to the time when she had been virtually restored to the possession and control of her owners by being left in the care of the mate, who brought her into port."

In short, the claim for a constructive total loss in the *Greene* case was solely based on conditions resulting from an earlier "forcible dispossession by" the

for the District of Maryland. Accordingly, the rule of the *Wilburn Boat* case, 348 U. S. 310, as to modification by State law of the general maritime law applicable to hull policies has no application to the cases at bar. Instead, the instant cases seem to come squarely within Mr. Justice Story's ruling in *Carpenter* v. *Providence Washington Ins. Co.*, 16 Pet. 495, at p. 511, that, "upon the construction of a contract of insurance * * * the decisions of state tribunals * * * cannot conclude the judgment of this court".

[15] At that time (1864), separate policies specifically affording coverage against war risks had not evolved. A simple form of F. C. & S. Clause had only recently come into use. See Secs. 392 and 439 of *18 Halsbury's Laws of England* (2nd Ed.—1935).

crew "of the master and other officers from the ship" (p. 220), which clearly constituted simple mutiny and which, as such, was well recognized as "one form of barratry" (p. 220). Thus the actual issue of law which the Court was there called on to decide was whether the exclusion of "seizure" by the prototype in that policy of the present more extensive F. C. & S. Clause[16] should be construed as (p. 220) "exempting this particular mode of committing the act from the general risk of barratry which the underwriters assumed" as part of the standard marine cover. In the context of these circumstances, the Court was (pp. 220-1) "of opinion the exception of a loss by seizure does not include the risk of mutiny of the mariners and the forcible taking of the ship from the control of the officers; * * *." Later, after observing that (p. 222),

> "Whether it can have a broader meaning, so as to include a forcible taking of a ship as an act of hostility or for the purpose of plunder, it is not necessary now to determine,"

the Court stated, as its actual ruling on the meaning of the term "seizure" as an exclusion from marine coverage, that (p. 222):

> "It is sufficient to say, that it cannot be interpreted to include the dispossession of the master and other officers from the ship by the mariners, and *the barratrous conversion of her by them to their own use.*" (Italics ours.)

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[16] The F. C. & S. Clause in the *Greene* case policy read: "Free from loss or expense arising from capture, seizure or detention" (p. 218). For a history of the evolutional development of the F. C. & S. Clause, see Secs. 392 and 439 of *18 Halsbury's Laws of England* (2nd Ed.—1935).

In the cases at bar, there was no "conversion * * * to their own use" of the six vessels at Hongkong or even of the "Hai Hsuan" where a mutiny was the first link in the chain of events leading to her loss by the Nationalist, to the Chinese Communist, Government.

It is further to be noted that the circumstances in the *Greene* case which were claimed to constitute a "seizure", had no affinity whatsoever to the intent and purpose of a F. C. & S. exclusion. Above all, however, the marine policy involved in the *Greene* case specifically insured "the general risk of barratry" (p. 220), whereas the war risks policies, on which recovery has here been allowed, do not do so. See pp. 31-32 below for a more detailed discussion of the relation of "barratry" to war risks coverages.

With the exception of the *Kleinwort* case, 1 El. & El. 447, which both that Court and the Courts below in the instant cases thought distinguishable, neither of the two other cases[17] cited by Chief Justice Bigelow had even a remote bearing on the question of law in issue.

In discussing the *Greene* case, Judge Soper described it as (p. A9, *infra*) a "celebrated and widely cited opinion." According to *Shepard's Citations*, it had been cited (during the 93 years prior to Judge Thomsen's opinion herein) in a total of only seven

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[17] *Lawrence* v. *Aberdein*, 5 B. & Ald. 107, and *Lawton* v. *Sun Ins. Co.*, 2 Cush. 500.

cases.[18] None of them, however, involved in any way either the term "barratry" or the term "seizure" or any other point of law having any relation whatsoever to the proposition for which it was cited and relied upon by Judge Soper as stating "the law" by which "the liability of" your petitioner "not only for the loss of the six Hongkong ships but also for the loss of the 'Hai Hsuan' is established" (p. A13, *infra*)!

If such an interpretation of the *Greene* case is correct and such is "the law" establishing the liability of war risks underwriters under circumstances as existed here, then it should be stated in clear terms by, and with the authority vested only in, this Court.

B.

The ambiguities in, and confusion resultant from, this decision of the Court of Appeals should be resolved by this Court.

The Court of Appeals accepted, as "the law" here applicable (p. A13, infra), the 1864 rulings of the Massachusetts State Court in the *Greene* case. The Court of Appeals, in so doing, either overlooked, or paid little attention to, the very fundamental differences between marine risk coverage—the only type involved in the *Greene* case—and the nature and extent of the specified coverage afforded by modern

[18] Some American text writers, it is true, do mention the *Greene* case (always briefly and often merely in footnotes) for the simple proposition which it actually decided (p. 222 of 91 Mass.), namely, that the term "seizure" in a marine policy does not extend to the violent taking possession of a ship by a mutinous crew to their own use.

policies against war risks, such as those here involved and under which recovery has been allowed below.

Its oversight, or disregard, of the fundamental differences—particularly in so far as "barratry" is concerned—between those two types of coverage is not only shown by its uncritical acceptance of the *Greene* case as "the law" establishing your petitioner's liability, but also by several other passages in the opinion it handed down herein.

Thus, it viewed, as is shown thereby, the sole issue as involving a determination between sharply black and white alternatives of broadly generic terms in that it stated the question for decision as being (pp. A5-A6, infra)

> "whether the loss of the vessels under the circumstances set out below should be ascribed to the barratry of the master or crew within the coverage of the policies or to capture and seizure which is excluded therefrom."[19]

It is open to speculation whether its uncritical reading of the *Greene* case influenced the Court into stating the issues here involved in the broad form of generic alternatives, as just quoted, or whether an impression, or mistaken belief, that war risks coverage

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[19] Such form of stating the question assumes at the very outset that, as determinants of liability under a modern war risks policy, the terms "barratry" and "seizure" are mutually exclusive, irrespective of the nature and purpose of the barratrous acts and of the situation resultant therefrom. In short, an implied premise of such formulation of the issue is the postulation that it is impossible, by definition of the terms and as a matter of law, for there to be such a thing as a barratrous seizure as a cause of loss under a modern war risks policy. That, however, is itself one of the questions of law involved in this case.

includes the general risk of barratry (and with the same meaning of that term as applies to marine risk policies) lead to its acceptance of the *Greene* case as a correct statement of "the law" (p. A13, infra), establishing liability "for the loss of the six Hong Kong ships" as to which the District Court had held your petitioner liable as war risk insurer (Thomsen, R. 46).

That the latter of these alternatives may be the correct one, derives considerable support from the descriptive passages in the immediately preceding paragraph of its opinion and which is thus part of "the background" against which the Court stated (pp. A5-6, infra) that "we come to consider" the issue as quoted above. The material parts of that paragraph read (p. A5, infra):

> "The war risk policies cover the risks, *including barratry,* which would be covered by the marine risk policy in the absence of the above quoted 'free of capture and seizure' exclusionary warranty. Originally the war risk policies did not exclude capture and seizure * * *." (Italics ours.)

Such a generalized statement—while entirely consonant with its decision herein—discloses an unfamiliarity with the scope and nature of war risk coverage (especially in so far as "barratry" may be involved) and a failure of analysis in that respect.

Where liability is predicated on the war risk coverage, as is here the case (Thomsen, R. 46), it is of prime importance to bear in mind that while "barratry" is one of the perils specifically enumerated in

standard marine policies, the term does not appear in any of the provisions of the war risk policies. By their explicit terms, the latter cover "only those risks which would be covered by" the marine policies "in the absence of the F. C. & S. warranty contained therein, but which are excluded by that warranty" (R. 241). Nor is "barratry" specifically named in that warranty (R. 240-241).

Moreover, the fact that the term, "barratry of Master and Mariners", has, as it does, such an unusual scope and nature, as well as esoterically technical meaning and import, of itself requires special consideration and analysis. Although used as a noun, it is not actually an entity in itself and more frequently partakes of the nature of a descriptive, or identifying, adjective.

Essentially the problem thus presented is one of legal taxonomy. On the basis of that approach, it becomes clear that the term "barratry" in the perils clause of the marine policy is descriptive of, and constitutes, a phylum, or group, of acts of various types or classes, any one of which will be deemed to cause a loss by barratry within the marine cover if done by a Master and/or the crew.

In contrast, the coverage afforded by a war risk policy in respect of a loss by barratry is quite different both in nature and extent. Only certain particular acts, or causes, from the barratry phylum come within the limited coverage of the war risks policies. In other words, the latter policies do not insure against the general risk of barratry (as do marine policies), but only against those specific acts of a

barratrous nature which, by being excluded by the F. C. & S. Clause, become risks within the war cover.

Neither in its decision nor in its statement of the question involved, does the Court of Appeals appear to have given any recognition to the foregoing distinctive nature of the war risk coverage in relation to "barratry".

As previously indicated, the opinion of the Court of Appeals also leaves in vague and, at best, very generalized terms the question of what is to be considered in point of fact and circumstances as barratrous conduct within the coverage against war risks. It quotes various definitions of the term "barratry" as used in marine coverage; it recites the failures of the Masters to obey orders from Formosa to leave Hong Kong (which, however, though it makes no mention of it, merely caused a "barratrous delay"—R. 207); but it does not specify and define "barratry" under war risks coverage. In other words, here again its decision, unless clarified and explained, can only cause future confusion.

C.

Rulings of the Court of Appeals herein present direct conflicts with rulings of this Court and of the House of Lords.

1. *Conflict with This Court.*

Guaranty Trust Co. v. *U. S.*, 304 U. S. 126, at p. 137, reaffirmed the principle that "the rights of a sovereign state are vested in the state rather than in any particular government which may purport to

represent it."[20] In *Marcardier* v. *Chesapeake Ins. Co.*, 8 Cranch 39, this Court held that barratry can only be committed against the owner of the vessel and not against any other interest. Accordingly, your petitioner maintains that it could not be barratry for the Masters and crews of state-owned Chinese vessels anchored at Hongkong to attorn to the only government of China there recognized as legitimate. In ruling that barratry was committed at Hong Kong, the Court of Appeals (pp. A15-A18, *infra*), in effect, held that the Nationalist Government is a sovereign entity independent of the Chinese State and was the owner of the vessels in suit.

2. *Conflict with House of Lords in at Least Two Cases.*

(i) *The Minden* (*Robertson* v. *Forestal Land etc. Co.*), 1942 A. C. 50 (H. L.), was an action on Lloyd's marine and war risk policies[21] insuring cargo from Buenos Aires to Hong Kong on a German vessel in August-September, 1939. In accordance with standing orders of the German Government, the vessel first deviated to a neutral port on the eve of World War II and a few days after its outbreak sailed therefrom in an attempted run to Ger-

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[20] See also, *Lehigh Valley R. Co.* v. *The State of Russia*, 21 F. 2d 396, 400; *The Rogdai*, 278 F. 294, 296 (concerning the right to possession of a state-owned vessel); *United States of America* v. *McRae*, L. R. 8 Eq. 69 (following the recission of England's declaration of neutrality in the U. S. Civil War); and *Haile Selassie* v. *Cable & Wireless, Ltd.*, [1939] L. R. Ch. D. 182.

[21] The latter, like the war risks policies at bar, incorporated war clauses which afford coverage against the risks excluded from the standard form of marine policy by the F. C. & S. Clause.

many. While so en route, "in the presence of a British warship, she was scuttled by those on board off the Faroe Islands, and was lost with all her cargo, including the insured goods" (p. 56).

The reasoning which led to the underwriters being held liable under the war risks cover was (a) that a "constructive total loss occurred when the German captain obeyed the instructions of his Government and held the goods as the subject and servant of that Government instead of holding them as bailee of the assured" (p. 64 of 1942 A. C.), and (b) that such constructive total loss to the assured (p. 111 of 1942 A. C.) was "converted into an actual total loss" when (p. 56 of 1942 A. C.) "in the presence of a British warship, she was scuttled * * * and was lost with all her cargo, including the insured goods".

The basis for liability under the war risks coverage was stated with particularity by Lord Wright at p. 79 of 1942 A. C.:

> "*Was what the master did an executive act of the German government? I think it was.* * * * What happened here was that the master, being in possession of the goods as a carrier for the assured, seized them in the sense that he ceased to hold them as carrier and changed the character of his possession by taking and controlling them as agent for the German government with the intention and effect of holding them adversely to the assured and applying them to the hostile purposes of his government. In doing so he deprived the assured of them. The courts below have rightly fixed *the overt act of hostile seizure* as

being committed when the master sailed from Rio." (Italics ours.)

See also Lord Porter's observation at 111 of 1942 A. C. that the goods "had previously been seized" before "that loss, whether partial only or constructive and total, was by the scuttling converted into an actual total loss * * *."

Lord Wright pointed out that the initial taking of the assured's goods was by the Master's (p. 80 of 1942 A. C.) "dealing with them adversely to their interests and throwing off the role of a private carrier in which capacity he had held them up to then as a bailee for the assured" and that clearly (p. 80) "a restraint may operate without any display of force". He added: "The restraint which was operating on the master was the compelling force of the German State to which he was subject" (1942 A. C. at p. 80).[22]

Lord Wright further ruled that the Master's act which constituted the "seizure", adverse though it was to the cargo in his custody and control, "could not be regarded as piracy * * *. Nor could it be called barratry * * *." Although Judge Soper con-

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[22] By reason of the spread of complete Communist control over their domicile at Shanghai and/or other places on the mainland of China, the Masters, officers and crew of these vessels at the times here material had become, by operation of law, citizens of the People's Republic of China and so subject, along with their families in Shanghai, to "the compelling force of" the laws and orders of that State. In other words, obedience to the orders of the Nationalist Government in respect of the "State property" represented by these vessels would have entailed self-imposed exile from home and family in order to avoid punishment by the Communist Government of China.

sidered *The Minden* to be distinguishable from the cases at bar on the very ground that "There was no barratry in [that] case" (p. A15, infra), it is submitted that when the passage in question in Lord Wright's speech is read in its full context (i. e. pp. 79-80 of 1942 A. C.), it actually amounts to direct support for the proposition that, in the instant cases, the acts of the Master and/or officers and crew are not to be deemed to constitute "barratry" to the exclusion of "seizure".

A reading in its complete context discloses that the reason the act of the Master was deemed by Lord Wright not to be regarded either as piracy or as barratry was that, as a matter of both fact and of law, the Master had radically "changed the character of his possession by taking and controlling them as agent for the German government with the intention and effect of * * * applying them to the hostile purposes of his Government" (pp. 79-80 of 1942 A. C.). The "executive act" referred to by Lord Wright and held by him to differ from "barratry" and to amount to a "seizure" within the coverage of the similar war risks coverage is parallel in nature with the acts in the instant cases which caused the loss of possession and control of the vessels to the Chinese Communist Government.

From the foregoing, it is clear that, if Lord Wright's rulings in "*The Minden*" are applied to the situation here presented, they would establish a "seizure" within the meaning of that term in war risks policies and at the same time would exclude such acts from being regarded as barratry within the meaning

of that term as used in contracts of insurance. In short, the decision of the Court of Appeals here sought to be reviewed is in double conflict with the legal principles set forth in Lord Wright's speech in *"The Minden"*.

(ii) A direct conflict with the rulings of the House of Lords in *Cory* v. *Burr,* (1883) 8 App. Cas. 393, affirming a judgment in favor of the hull underwriters, arises from the position taken herein by the Court of Appeals that the F. C. & S. Warranty cannot be operative if "barratry" is also present as an element of the cause of loss. There, as a direct and sole consequence of the "admitted * * * 'barratry' of the master" (8 Q. B. D. at p. 314), the vessel was seized by Spanish revenue officers and would have become a constructive total loss by confiscation "if money had not been paid to redeem the ship * * *" (p. 396 of 8 App. Cas.). After holding that such loss fell within the term "seizure", the House of Lords (as had the other English Courts in that case) held that the F. C. & S. Warranty applied even though there had also been "barratry" and that liability on the part of the hull underwriters was, therefore, excluded by the term "seizure" in that warranty. The argument advanced on behalf of the assured and the legal principles in complete answer thereto were thus summed up by the Earl of Selborne, L. C., (p. 397 of 8 App. Cas.):

> "But then it is contended that, though there was a capture or seizure, and though the capture or seizure only caused the loss, and there would have been no loss without the capture or seizure, yet that if a claim might be made upon the foot-

> ing of barratry, then the warranty does not apply. I confess I have never seen how such a construction could be put upon the policy and the warranty, taken together, without leading to consequences altogether destructive of the whole operation of the warranty."

In summary, serious conflicts exist between the rulings of the Court of Appeals herein and well-settled rulings of the House of Lords in at least two cases as to the effect of barratry in relation to losses falling within the scope of the F. C. & S. Warranty and also as to meaning and scope of the term "seizure" in that warranty.

This Court has more than once given its approval to the observation by Mr. Justice Holmes in *The Napoli,* 263 U. S. 487, at p. 493, as to there being "special reasons for keeping in harmony with the marine insurance laws of England". This maxim is peculiarly apposite here where the nature and extent of the term "seizure", one of the primary perils covered by modern war risks policies, is involved.

The need and desirability of removing, or explaining, these conflicts with rulings of the House of Lords thus constitute not merely another well recognized ground (*Aetna Ins. Co.* v. *United Fruit Co.*, 304 U. S. 430, at p. 434, and cases there cited), but also an important reason, for granting certiorari in the cases at bar.

Conclusion

By reason of the premises, writs of certiorari should issue in the six cases relating to the vessels at Hong Kong, and also in the separate action relating to the "Hai Hsuan", to review the decision of the Court of Appeals herein.

Dated: July 3rd, 1958.

Respectfully submitted,

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APPENDIX A

C. A. Opinion

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7550.

National Union Fire Insurance Company of Pittsburgh, Pennsylvania, Respondent, Appellant and Cross-Appellee, and Appellee.

versus

The Republic of China, China Merchants Steam Navigation Company, Limited, and the United States of America, Libellants, Appellees and Cross-Appellants, and Appellants.

CROSS-APPEALS AND APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

SOPER, Circuit Judge:

These suits in admiralty were brought to recover the value of seven vessels which had been sold by the United States to the Nationalist Government of China and subsequently lost by the defection of their masters, officers or crew to the Communist Government of China. Each vessel is the subject of a separate suit but all of the suits were tried concurrently in the District Court. The libellants are

the Republic of China, China Merchants Steam Navigation Company, which operated the ships as a governmental corporation of the Republic of China, and the United States, the holder of purchase money preferred mortgages on the ships. The respondent is the National Union Fire Insurance Company of Pittsburgh, Pennsylvania, which had issued marine policies and war risk policies on each ship to the Government of the Republic of China, insuring it against the loss of the vessel resulting, in addition to other causes, from perils of the seas, barratry of the master and mariners or the consequences of civil war, excepting, however, capture and seizure. The principal question in each case is whether the loss of the vessel was caused by barratry, which was covered by the policy, or by capture and seizure, which were excluded from the coverage by the policy, or by both.

The District Judge filed a carefully considered opinion and exhaustive findings of fact to which reference may be made for detailed information. 151 F. Supp. 211. He held that six of the vessels were lost by barratry of the master and awarded damages to the libellants in the sum of $2,995,270.87, the face amount of the policies, with interest at 3 per cent from the date liability was denied to the date of the decree, and interest at 6 per cent from the latter date until paid. As to the seventh vessel the Judge dismissed the libel since he found that the loss was due to seizure of the ship by the crew which, in his judgment, was excluded from coverage by the terms of the policies. The insurance company has appealed from the adverse judgment as to the six vessels; and the libellants have appealed from the award of interest at 3 per cent to the date of the decree, claiming that they are entitled to 6 per cent for this period, and have also appealed from the judgment dismissing the libel as to the seventh vessel.

On various dates in 1946 and 1947, the United States sold to the Government of the Republic of China a number of Liberty ships, including the seven covered by the policies in suit. In each instance the buyer executed and delivered to the United States, represented in some instances by the

Maritime Commission and in others by the Export-Import Bank of Washington, a note and a preferred ship mortgage to secure the unpaid balance of the purchase price. Defaults in these mortgages occurred in October 1949, and were declared by the United States on or about January 17, 1950, whereby it acquired the right to retake the vessels.[2] (sic.)

The Republic of China, the named insured in all of the policies, was proclaimed in 1911 and in the middle 1920's established a strong national government at Nanking. Following World War II, Taiwan, which had been surrendered to Japan in 1904, was reincorporated into China as a province. In 1937, the Chinese communist movement actively organized resistance to Japan in northern China. After World War II Communist Armies dominated northern China and in 1949 drove southward so that as of April 19, 1949, a state of civil war existed. The Nationalist Government, under increasing pressure, moved its capital from Nanking to Canton in April, 1949; thence to Chungking and to Chengtu and, finally, to Taipei, Taiwan, on December 9, 1949, by which time the mainland was largely in control of the communist forces. Since that date it has continued to operate on Taiwan as a sovereign entity. It is recognized by the United States as the only proper and lawful government of China and its officials are the accredited representatives of the Republic of China in the United Nations.

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[2] As of December 31, 1956, the balances due on the several notes, with interest, were as follows:

Ship	Outstanding Balance of Principal	Total Interest (3½% to date default declared 6% thereafter)	Total Principal & Interest
	Eximbank		
Lin Shen	$416,100.00	$185,329.80	$601,429.80
Teng Keng	$390,640.00	$173,989.99	$564,629.99
Tsai Er	$390,640 00	$173,989.99	$564,629.99
	Maritime		
Cheng Kung	$313,200.00	$138,110.72	$451,310.72
Chiao Jen	$313,200.00	$138,553.75	$451,753.75
Hung Chang	$313,200.00	$137,890.67	$451,090.67
Hai Hsuan	$373,880.00	$165,737.29	$539,537.29

On October 1, 1949, the Communist Government was proclaimed under the name of the Central People's Government of the People's Republic of China. On October 14, 1949, it occupied Canton, which is close to the port of Hong Kong, a Crown Colony of the United Kingdom. On January 5, 1950, the British Government recognized the Communist Government as the de jure government of China and ceased to recognize the Nationalist Government as a de jure government. A number of other nations extended de jure recognition to the Communist Government.

After the ships were acquired they were operated by the Nationalist Government through an agency which, in September, 1948, was organized as a government-owned corporation called the China Merchants Steam Navigation Company, Ltd. The head office of the company was located at Shanghai until May, 1949, when it was transferred to Taipei, Taiwan, with a branch office at Hong Kong. The port of registry of each of the vessels was transferred to a port on Taiwan in the latter part of 1949. The respondent insurance company recognized this government agency as the representative of the Nationalist Government in the operation of the ships and transacted with it the insurance business relating to vessels owned by the Nationalist Government, including the seven vessels in this suit. The insurance company accepted premiums on the policies, which were paid out of the funds of the Republic of China, and recognized the Republic of China as the owner of the fleet which it had insured against loss.

The insurance policies covering the seven vessels were issued at various dates in 1949.[3] The named insured in all of the policies is "The Government of the Republic of China represented by Universal Trading Corp." and the loss, if any, was made payable to the United States Mari-

[3] For example, the Teng Keng was insured for $372,075 under marine policies issued on May 24, 1949, which were in effect during the events hereinafter related and until April 1, 1950, and also war policies which were issued on December 15, 1949, and terminated on January 17, 1950, and other war risk policies issued, on the last mentioned date and terminated April 1, 1950.

time Commission, or the Export-Import Bank, for distribution to itself and to the Government of the Republic of China as their interest might appear. The total amounts for which the vessels were insured were: Cheng Kung $470,000; Chiao Jen $470,000; Hung Chang $470,000; Lin Shen $342,375; Teng Keng $372,075; Tsai Er $342,375; Hai Hsuan $550,000. The policies were valued policies.

The marine risk policies are in the customary form with a Free of Capture and Seizure clause or warranty added. The terms of these policies with which we are particularly concerned insure against loss of the vessel resulting, in addition to other considerations, from "Barratry of the Master and Mariners and all other like Perils, Losses and Misfortunes," but exclude claims for loss, damage or expenses "resulting from capture, seizure, arrest, restraint or detainment or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise; whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations * * * Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy."

The war risk policies cover the risks, including barratry, which would be covered by the marine risk policy in the absence of the above quoted "free of capture and seizure" exclusionary warranty. Originally the war risk policies did not exclude capture and seizure but contained certain trading warranties, which were modified from time to time, to limit the ports in China at which the ships could touch, so as to avoid the danger of capture by the communists. In June 1949, when the communist armies were rapidly extending their area of conquest, the clause "excluding capture and seizure" was added to the war risk policies, obviously to avoid capture by the communist forces.

Against this background we come to consider whether the loss of the vessels under the circumstances set out below should be ascribed to the barratry of the master or crew

within the coverage of the policies or to capture and seizure which is excluded therefrom. The relevant findings of fact of the District Judge, which are supported by the evidence, may be summarized as follows:

The six vessels first listed above were among thirteen vessels, owned by the Nationalist Government and managed by China Merchants, which were in the port of Hong Kong during November and December, 1949. For convenience the six vessels have been designated as the "Hong Kong vessels" in this opinion.

China Merchants maintained its head office, under a general manager, in Taipei and a branch office in Hong Kong where a branch manager and marine superintendent were located. From November 13, 1949 to January 16, 1950, when the communist threat was becoming more and more imminent, the general manager sent many messages to the Hong Kong office and to the officers and crew of the ships ordering the ships to leave Hong Kong and sail for Taiwan or Japan or, in some instances, to the Philippines. These orders were ignored since most of the ships' personnel were reluctant for a number of reasons to go to Taiwan and were inclined to favor the communist regime. These reasons were reported to headquarters, together with a request for additional money for wages and supplies. The necessary money was sent by the Taiwan office to Hong Kong. There were communist agents as well as agents of the Nationalist Government operating both in Hong Kong and on the ships; and on January 13, 1950, the manager and most of the employees of the Hong Kong office publicly defected to the Communist Government. The head office, however, remained completely loyal to the Nationalist Government, and there was nothing to prevent the ships from leaving the port except the unwillingness of the master and mariners to obey the orders of the head office. Two ships other than the six did sail to Taiwan. The Communist Government took over all the government property on the mainland that it could reach and its artillery dominated the harbor of Hong Kong; but it did not, by proclamation or otherwise, purport to take over the China

Merchants Steam Navigation Company or any ships in foreign ports.

The Hong Kong personnel continued to man the Hong Kong office but they displayed the Communist flag and operated for the benefit of the Communist Government; and on January 15 the master of each vessel voluntarily, as a result of an agreement amongst themselves, raised the communist flag in place of the flag of the Nationalist Government. The vessels remained in the port of Hong Kong until September, 1950, when they sailed for Canton. During that period the wages were paid by the Hong Kong office with money supplied by the communist regime. However, while the vessels were at Hong Kong no document or other paper was filed with the government of Hong Kong showing any change in the port of registry, owner or flag of any of the six vessels.

The Hai Hsuan, unlike the other six vessels, was on the high seas proceeding easterly through the Indian Ocean bound for Japan at the time of the British recognition of the Communist Government and at the time of the defection of the personnel in the Hong Kong office. The officers and crew of the ship learned of these incidents through British radio broadcasts. The master received orders by radio from the head office at Taiwan not to stop at any British port and to proceed at all possible speed to Taiwan. He was anxious to comply but the crew objected, first arguing through the officers for a stop at Hong Kong then later pressing for Singapore. The master was advised by a member of the crew that the chief engineer was leading a plot against him and trying to convince the other officers and mariners that the ship should be kept from going to Taiwan. A radio dispatch was received from the communist-controlled Hong Kong office to put into Singapore and the officers and crew held a meeting to decide which orders to follow. The master informed the gathering that his orders alone should be obeyed. He decided that the ship should not go to Singapore. But, when the ship was 100 miles west of Singapore, the chief officer

threatened to stop the engines if no call w s made at that port. The master gave no heed to this s ement but on the following day, January 23, when Singapore was thirty miles distant, the engines stopped and the master, several days without food and apparently quite ill, radioed Taiwan that he was sick in bed and requested orders. In reply the head office, unaware of the situation on board the ship, instructed the chief officer to assume command and proceed to Taiwan. Instead, he put into Singapore on January 24, and on January 26, after the master had been admitted to a hospital on shore, having left behind all papers, log books and radio messages, the communist flag was raised over the vessel. The wages of the crew were thereafter paid by the communists in control of the Hong Kong office. On February 1, China Merchants instructed Paul H. Paulsen, master mariner, to take command of the vessel in Singapore. Unable to get police protection from the harbor authorities, he mustered a skeleton crew and, unarmed, boarded the ship. Upon request that the ship be turned over, the Chinese crew voted a refusal and grew belligerent. Captain Paulsen then abandoned the venture and took his men ashore.

The crucial question is whether under these circumstances the activities of the masters of the Hong Kong vessels and of the crew of the Hai Hsuan amounted to barratry. The following excerpt from the opinion of Judge Thomsen in the District Court sets out the generally accepted definition of the offense of barratry with the supporting authorities:

> "The classic definition of barratry was given by Lord Ellenborough, C. J., in *Earle* v. *Rowcroft*, 8 East 126, at 138: '* * * a fraudulent breach of duty by the master, in respect to his owners; or, in other words, a breach of duty in respect to his owners, with a criminal intent, or ex maleficio, is barratry. And with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be owing to an act of the master, induced

by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing.' The English Marine Insurance Act, 1906, Sch. I, Rule 11, provides: 'The term "barratry" includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer.' This definition is accepted in America as well as in England. *Arnould*, sec. 839; 1 *Phillips on Insurance*, (5th ed., N. Y., 1867), sec. 1062; *Patapsco Ins. Co.* v. *Coulter*, 28 U. S. (3 Peters) 222; *Greene* v. *Pacific Mutual Ins. Co.* 91 Mass. (9 Allen) 217. Wilful nonfeasance of the master, doing nothing, if productive of mischief to the owner, may be barratry. *Patapsco Ins. Co.* v. *Coulter, supra.* If the captain deviates, or is compelled by the crew to deviate the vessel from its proper course and to put into an unauthorized port in fraud of his or their duty to owners, it is barratry. So is unreasonable or criminal delay. *Arnould*, sec. 844, 847. Where a captain, acting in collusion with the captain of an enemy ship, sailed his vessel to an area where she was captured by the enemy ship, it was held that recovery might be had either on the ground of barratry or of capture. *Arcangelo* v. *Thompson*, 2 Camp. 620. Crime is not a necessary element of barratry. *Arnould*, sec. 845, 847. Mutiny of mariners is discussed in *Arnould*, sec. 848, which says that 'where the crew overpower the captain or constrain him to consent to their proceedings, the same acts would be barratry in them as in the master.'"

The celebrated and widely cited opinion of Chief Justice Bigelow in *Greene* v. *Pacific Mutual Life* (sic) *Ins. Co.*, 91 Mass. 217 (1864), applied these principles to a case in which the owner of a whaling ship recovered from the insurance company for a loss sustained when the ship was taken from the command of the officers and the possession of the owner by a mutinous crew. The master and third officer were killed, the first and second officers were badly

wounded and the ship and its equipment was so badly damaged that the voyage was necessarily abandoned. The principal question considered by the court was whether the insurance company was liable for the loss under the clause covering "barratry of master or mariners" or was exonerated under the clause by which the vessel was warranted "free from loss or expense arising from capture, seizure or detention". The company defended on the ground that the evidence showed a "seizure" of the vessel by the mutinous acts of the crew. In discussing this question, the Court said, page 220:

> "* * * Barratry is one of the enumerated perils against which the defendants insured the plaintiff. This is a generic term which includes many acts of various kinds and degrees. It comprehends any unlawful, fraudulent or dishonest act of the master or mariners, and every violation of duty by them arising from gross and culpable negligence contrary to their duty to the owner of the vessel, and which might work loss or injury to him in the course of the voyage insured. A mutiny of the crew and forcible dispossession by them of the master and other officers from the ship is only one form of barratry. Now it is obvious, in a practical point of view, that no reasons existed for exempting this particular mode of committing the act from the general risk of barratry which the underwriters assumed. There was nothing in the nature of the voyage, or the business in which the ship was to engage, which furnished occasion for such exception. Nor is it reasonable to suppose that the parties, if they contemplated such a special warranty against a particular form or mode of committing an act of barratry, would have expressed it in language which, as applied to the subject matter, leaves this meaning, to say the least, exceedingly doubtful and ambiguous. This consideration is of itself quite decisive of the construction which it is our duty to put on the policy declared on. Inasmuch as barratry is one of the risks assumed by the assured, unless particular acts are

clearly excepted in terms which leave no doubt as to their meaning, the general words of the policy must have full operation. 1 Phil. Ins. §1163. *Lawrence* v. *Aberdein*, 5 B. & Ald. 107.

"But we do not deem it necessary to put the decision of this point on so narrow a ground. Upon careful consideration, we are of opinion that the exception of a loss by seizure does not include the risk of mutiny of the mariners and the forcible taking of the ship from the control of the officers; or, in other words, that it does not properly exclude from the operation of the policy a loss by barratry. Certainly the word 'seizure' cannot be applied to any barratrous act of the master. He has by law possession and control of the ship. He may, it is true, take her out of her course, or convert her to his own use in violation of his duty to the owners. But he cannot be justly said to seize that which is already in his own keeping. The same is true to a certain extent of the mariners. While in the discharge of their duty they have a qualified possession of the vessel. Subject to the order of the master, it is in their care and custody. If they violate their duty and disobey the master, displace him from command and assume entire control of the vessel, it is a breach of trust rather than a seizure. *Lawton* v. *Sun Ins. Co.* 2 Cush. 500, 514. It can be properly described only as barratry, in like manner as misappropriation of money by a servant or agent to whom it is intrusted is, correctly speaking, embezzlement, and not larceny. Indeed, the word 'seizure,' as applied to the contract of insurance, may be said to import the taking possession of a ship or vessel by superior force, or by violence from without, and not a barratrous conversion of her by the officers and crew, or either of them. No adjudicated case can be found in which it has been interpreted to include an act of the latter character. The recent case of *Kleinwort* v. *Shepard*, 1 El. & El. 447, cited by the defendants' counsel, is authority only for the position that a forcible dispossession of the master and mariners by passengers acting mutinously might properly be deemed a seizure. We are not pre-

pared to say that the conclusion arrived at by the court in that case was a sound one. But it differs essentially from the case at bar in the leading fact that the ship was there forcibly taken possession of by persons who were incapable of committing an act of barratry, because they had no care or custody of the ship, and stood in no relation of trust towards the owners. There was some ground, therefore, for regarding the mutinous act of the passengers as violence from without, and so within the warranty which exempted the insurers from loss by seizure. That the word was not intended to be used in any broader sense, in the policy declared on, so as to embrace the barratrous acts of the crew, is manifest from the connection in which it stands in the warranty. The exemption is from liability for loss by reason of capture, seizure or detention. Capture and detention are both risks which can arise only from acts of persons having no connection with the ship, who take her out of the possession of the master and mariners forcibly, either without right or by the authority of law. The rule of interpretation, that words coupled together in the same sentence are to be understood and construed *in eodem sensu*, warrants the conclusion that 'seizure' was intended to be understood as having reference to a similar class of risks, and to exempt the insurers from liability to loss arising from a forcible taking of the vessel by others than the officers or crew.

"Authority is not wanting for the position that 'seizure,' in a contract of insurance, is always to be understood in a restricted and limited sense, as signifying only the taking of a ship by the act of governments or other public authority for a violation of the laws of trade, or some rule or regulation instituted as a matter of municipal policy, or in consequence of an existing state of war. It is so understood in the commercial code of continental Europe. In this sense, too, it is used in other clauses of the policy declared on which exempt the underwriters from liability for 'seizure for or on account of illicit or prohibited trade,

> or trade in articles contraband of war.' Such undoubtedly is its most common and ordinary signification, as applied to the subject matter of marine insurance. Whether it can have a broader meaning, so as to include a forcible taking of a ship as an act of hostility or for the purpose of plunder, it is not necessary now to determine. It is sufficient for the decision of the present case to say, that it cannot be interpreted to include the dispossession of the master and other officers from the ship by the mariners, and the barratrous conversion of her by them to their own use."

This decision has been repeatedly cited and the principles enunciated have been generally accepted by text writers on the subject of marine insurance. See 1 Phillips, *Insurance*, 5th ed., 1867, p. 652; 1 Parsons, *Law of Marine Insurance*, 584; Richards on Insurance, 4th ed., 1924, p. 834; 5 Appleman, *Insurance Law and Practice*, 1941, §3256, note 37; and so it has become familiar knowledge to underwriters of marine insurance and their technical advisers, as pointed out in the opinion of the District Court, that according to recognized authority the term "seizure" does not include a violent taking of possession of the ship by a mutinous crew.

In this view of the law, which we accept, the liability of the insurance company not only for the loss of the six Hong Kong ships but also for the loss of the Hai Hsuan is established. We are unable to accept the conclusion of the District Judge that the insurance company has no liability for the loss of the Hai Hsuan, a conclusion which is based on the stated distinction between the "possession and control" of the ship by the master and the "qualified possession" of the crew. Undoubtedly the possession of the crew is subject to the paramount authority of the master but they are not relieved from their own obligation to the owner when for any reason the master is unable to carry on. Clearly the crew cannot rid themselves of this duty of obedience to the owner by forcibly taking the controlling possession of the vessel out of the hands of the master. On the contrary, their duty becomes the greater

when they depose the master and arrogate the supreme authority to themselves. As Chief Justice Bigelow said in the *Greene* case: "If they violate their duty and disobey the master, displace him from command and assume entire control of the vessel, it is a breach of trust rather than a seizure."

No case has come to our attention in which the barratrous conduct of either the master or the crew of a vessel has been held to be within the capture and seizure exclusion clause of a marine insurance policy.

In *Kleinwort* v. *Shepard*, 1 El. & El. 447, 120 Eng. Rep. 977 (1859), coolie passengers took control of a ship and made off with her. The court, in holding that the resulting loss came within the exclusion of "capture and seizure," inquired argumentatively whether it would not also be a seizure if a crew, intending to turn pirates, should murder the captain and run away with the ship. But this was mere dictum, aimed at answering the argument of counsel for the assured that "seizure" within the warranty had to be belligerent and come from without. The single point decided was that the passengers on board the ship, owing no duty of loyalty to the owner and being incapable of committing barratry, had effected a "seizure" of the vessel within the excluding clause. There was no barratry of master or mariners in the case.

The closest case in the view of the respondent insurance company is *The Minden* [1942] A. C. 50, which considered the action of a German master of a German vessel carrying British cargo at the beginning of World War II. Acting under orders of the German Government the master scuttled the ship to prevent her capture by the British. The British court held that the insurance company was liable under a cargo policy insuring against loss by "capture, seizure, arrest, restraint * * * and detainment of all kings, princes, and peoples." The respondent contends that the opinion of Lord Wright, characterizing the action of the German master as a "seizure" of the British cargo, is unassailable authority for the proposition that a person

in qualified possession of a thing, such as a master in charge of a ship, can "seize" it from the owner by merely changing the character of his possession. The decision, however, does not justify this conclusion since it was directed to the relationship of the master to the owner of the cargo which differs from his relationship of trust to the owner of the ship in that a breach of the latter amounts to a barratrous act within the coverage of the policy. There was no barratry in the case of *The Minden.*

The respondent also relies on the decision in *Cory* v. *Burr*, 8 App. Cas. 393 (1883). In that case the captain of a ship, disregarding his obligation to the owners in order to serve his own ends, used the vessel in smuggling transactions, and while she was stopped at sea in order to transship the smuggled goods she was taken by a Spanish revenue cutter. It was held that the loss was caused not by the barratry of the master but by the seizure of the ship by the Spanish Government. This holding distinguishes the decision from the instant case where it has been found that the barratrous acts constituted the ultimate and efficient cause of the loss of the Hong Kong ships, since it was brought about by the voluntary acts of the masters and crews in possession and was not compelled by the superior forces of the Communist Government. This is the more clear in the case of the Hai Hsuan since the defection of her crew began on the high seas beyond any possible reach of the communist forces.

The respondent's defense, however, is not based alone upon the exception of seizure from the coverage of the policy. Another major contention, which goes to the heart of the case, is based upon the proposition that the acts of the masters and crews were not barratrous since they did not constitute a breach of duty to the owners of the ships. The argument rests on the doctrine approved in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 127,[4] that the

[4] See also *Lehigh R. Co.* v. *State of Russia*, 2 Cir., 21 F. 2d 396; *The Rogdai*, N. D. Cal. 278 F. 294; *Haile Selassie* v. *Cable & Wireless, Ltd.*, [1939] 1 Ch. 182.

rights of a foreign state are vested in the national entity, which is the state, rather than in any particular government which may purport to represent it. With this rule in mind it is contended that title to the ships was not vested in the Nationalist Government of China but in the Chinese state and was not lost by it when the ships were turned over to the Communist Government in January in the port of the British colony of Hong Kong, because at that time and place the Communist Government was recognized by the British Government as the de jure government of China.

In the United States and in Great Britain it is established that the courts of the country must accept the action of the executive branch of their nation in recognizing the existence and authority of the government of a foreign state; and this action is binding upon the courts in resolving controversies between rival government factions, each claiming the right to represent a foreign state and to take possession of its property. *United States* v. *Pink*, 315 U. S. 203; *The Maret*, 3 Cir., 145 F. 2d 431, 439; *The Rogdai*, supra, *Haile Selassie* v. *Cable & Wireless, Ltd.*, supra.[5]

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[5] British courts in the Far East have accepted the recognition of the Communist Government of China by Great Britain in suits prosecuted to secure possession of the Hai Hsuan and other property that had come into the possession of the Communist Government. In *United States* v. *Yang Soon-Ee and Another* (*The Hai Hsuan*), 1 Malayan Law Report 63 (1950), the United States instituted legal proceedings to recover possession of the Hai Hsuan from her officers but the High Court refused to exercise jurisdiction on the ground that the Communist Government had possession of the ship and was entitled to sovereign immunity. In *Civil Air Transport, Inc.* v. *Central Air Transport Corp.*, [1953] A. C. 70, 2 Lloyd's Rep. 209, the object of the suit brought by an American corporation was to recover possession of airplanes in Hong Kong which had been sold by the Nationalist Government of China to the plaintiff corporation's predecessor in interest in December 1949, prior to British recognition of the Communist Government. The validity of this sale was recognized and the claim of the Communist Government to the property was denied by the court since it was shown that the Communist Government had not taken possession of the property and the subsequent recognition was held not to operate retroactively to extinguish the title of the purchaser.

If we were confronted in the instant case with a claim of the Communist Government of China to property of the Chinese state in the possession of the Nationalist Government in the United States, we would be obliged to decide in favor of the latter despite the recognition by Great Britain of the former when its armed forces were in control of the area surrounding the Crown Colony of Hong Kong. That, however, is not the case before us. We are asked to give effect to contracts of insurance issued to the Nationalist Government when it was in control of large areas of the Chinese mainland and was engaged in a civil war for supremacy with the communist forces. That government, although now driven from the mainland, is still in existence and is in complete control of the island of Taiwan and its inhabitants and is still recognized by the United States and other nations as the true representative of the Chinese state. It is obvious that no fiat of the British Government promulgated in the interest of its colonial possessions in the Chinese area can alter these facts or nullify the actual existence of a government which is functioning as an independent nation.

The correct approach to the problem is set out in the following passage from the opinion of the District Judge dealing with the effect of Great Britain's recognition of Communist China:

> "But the instant suits present a problem which was not involved in those cases. The United States did not sell the ships to the Chinese nation or the Chinese state, but to 'the Government of the Republic of China'. That is the government which was and is popularly called the Nationalist Government. The insurer knew this, and wrote its policies accordingly. At the time of the sale a communist regime controlled a large portion of northern China, and claimed to exercise governmental authority over part, at least, of the territory it controlled. On October 1, 1949, the communists proclaimed the Central People's Government (the Communist Government) to be the government of all China. The Government of the Republic

of China (the Nationalist Government) continued to function, although it was forced to move several times, finally to Taipei, Taiwan. It is still recognized by the United States as the de jure government of China, and is a member of the United Nations, although the Communist Government was recognized by the British Government as the government of China on January 5, 1950.

"With knowledge of these facts, respondents, both before and after October 1, 1949, and after January 5, 1950, issued policies of insurance to the Government of the Republic of China as the named insured and accepted premiums thereon. Respondents are estopped to deny that the ships were owned by the Government of the Republic of China, the Nationalist Government, as distinguished from the sovereign state or national entity, China. Indeed, it is hard to tell what the sovereign state or national entity, China, should be considered to embrace, in view of the history of that country and the existence during all material times of two governments, each controlling part of the territory which was included in the Chinese empire and the Republic of China during most of the last 500 years, including the years since 1945.

"But it is not necessary to rest the decision on this point on estoppel. Under *United States* v. *Pink*, 315 U. S. 203, this court is bound to accept the political decision of the Department of State that the Nationalist Government is still the de jure government of China. That decision forbids this court to conclude that the Communist Government or any of its agents had the legal right to take over the ships."

The respondents further contend that masters and mariners who change sides in a civil war and take their ships with them cannot be considered to have committed barratry. The answer to this is simply that the characterization of an act as barratrous is independent of the motives which provoked the act. Barratry cannot be modified by patriotism. In *The Jupiter No. 3*, [1927] Prob. 122, the master who had been placed in command of a vessel by the

administrator for White Russian interests allowed the U. S. S. R. to gain possession of his ship. The court decided that the master "may have acted as a loyal subject of the U. S. S. R., but he betrayed his trust to his employers."

We find no error in the allowance by the District Judge of interest at 3 per cent on the face amount of the policies from the date of the rejection of the claims by the insurance company to the date of the decree and interest at 6 per cent thereafter.

The judgment of the District Court in each of the cases relating to the Hong Kong vessels will be affirmed and the judgment in the case relating to the Hai Hsuan will be reversed and the case remanded for further proceedings in accordance with this opinion.

This opinion was not submitted to Judge Parker before his death, but the case was considered by him in conference and he concurred in the conclusions reached.

Affirmed in part and Reversed in part.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 154

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, *Petitioner*,

v.

THE REPUBLIC OF CHINA, CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, and THE UNITED STATES OF AMERICA, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE REPUBLIC OF CHINA AND CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, IN OPPOSITION

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August 4, 1958

D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 154

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, *Petitioner,*

v.

THE REPUBLIC OF CHINA, CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, and THE UNITED STATES OF AMERICA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE REPUBLIC OF CHINA AND CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, IN OPPOSITION

CITATIONS OF OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 4-54[1]) is reported at 151

[1] "R" and "Blue R" will refer to petitioner's appendix and respondents' appendix, respectively, in the Court of Appeals. "Thomsen, R." will refer to the District Court opinion as printed in petitioner's appendix in the Court of Appeals. "Pet. App. A" will refer to the Court of Appeals opinion as reprinted in the appendix to the petition filed herein.

F. Supp. 211. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. A1-A19) is reported at 254 F. 2d 177.

The judgment of the Court of Appeals was entered on April 8, 1958. The petition for a writ of certiorari was filed on July 5, 1958.

QUESTIONS PRESENTED

1. The principal question is whether the losses of seven vessels owned by the Government of The Republic of China and under mortgage to the United States, which were caused by the acts of the masters and/or mariners of such vessels (disobedience of orders, sailing into or remaining in a forbidden port, retention of the vessels in derogation of the rights of the owner, hoisting of the Chinese Communist flag, etc.), are covered by the risk of "barratry" for which petitioner is liable under marine or war risk insurance policies[2], or whether such losses are excluded from coverage on the ground that such acts also constitute "seizure" within the meaning of the F. C. & S. ("Free of Capture and Seizure") warranty of the marine policies or the clause "excluding capture and seizure" in the war risk policies.

2. Fairly comprised within the above question is the issue as to whether petitioner is liable under the marine or war risk policies because of the barratrous acts which preceded the hoisting of the Communist flag on the vessels.

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[2] Barratry is covered by the marine policy; barratry consequent upon "civil war, revolution, rebellion, or insurrection or civil strife" is covered by the war risk policy.

3. The remaining issue is whether, in the alternative, petitioner is liable under the provision in the war risk policies insuring against "risks of civil war, revolution, rebellion, or insurrection or civil strife arising therefrom", regardless of barratry. This issue was raised by the libelants below, (R. 5), but neither of the lower courts found it necessary to decide the point.

STATEMENT OF THE FACTS

The decisions in the District Court and the Court of Appeals turn in large measure upon the extensive findings of fact of the District Court. These findings number in excess of 300 and are amplified in some respect in the opinion of the District Court. The Court of Appeals was in complete agreement with the findings of the District Court, and pointed out in its opinion that reference should be made to the District Court opinion and findings of fact for "detailed information" (Pet. App. A2). However, the petition has omitted pertinent facts upon which the decisions below depended which are essential to a proper consideration and disposition of the Petition for a Writ of Certiorari. Therefore, respondents (The Republic of China and China Merchants Steam Navigation Company, Limited,—"CMSN") deem it important to summarize the facts somewhat more extensively than otherwise would be necessary.

A. The Insured

On various dates during 1946 and 1947, the United States sold to "The Government of The Republic of China" a number of vessels, including the seven involved in these suits (Fdgs. 2, 3; R. 66-67; Thomsen, R. 7). At the time of the sales, the Chinese Commu-

nists dominated the northern part of China (Thomsen, R. 6; Pet. App. A3) It was the policy of the United States to see to it that vessels were not sold to Communist countries or Communist satellites, and the vessels were *not* sold to the Chinese Communists (Fdg. 3, R. 67).

At the time of the sales, hypothecations or preferred ship mortgages and promissory notes to secure payments of the purchase prices were executed by the "Government of The Republic of China", which were and are still held[3] by agencies of the United States—the Maritime Administration (Maritime) and the Export-Import Bank of Washington (Eximbank) (Fdgs. 4-7, R. 67-68; Thomsen, R. 7; Pet. App. A2-3). Because of defaults in these mortgages which occurred in October, 1949, each of the mortgages were declared in default by Maritime and Eximbank on or about January 17, 1950, a day or two after Communist flags were hoisted on the vessels in Hong Kong. As a consequence, the United States, which had security title to the vessels, acquired the right to retake them (Fdg. 6, R. 67-68; Thomsen, R. 7; Pet. App. A3). As of December 31, 1956, the total amount due under the mortgages exceeded $3,600,000.[4]

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[3] Although it does not effect disposition of the issues in the suits, in 1957 the United States succeeded in regaining possession of the HAI HSUAN which had continuously remained in Singapore since her loss in 1950, and sold the vessel for the gross sum of $150,102. Net salvage in the amount of $111,439.84 accrues to the benefit of the insurer and has already been credited against liability for total loss under the insurance policies.

[4] The amount stated in footnote 5 of the petition is an inadvertent error. The correct principal due is $3,510,860. See Thomsen, R. 7. Interest on the principal amounts has been accruing at 6% per annum since the declaration of default.

At the time of their sales, as well as when the losses occurred, the seven vessels and other similarly acquired vessels were registered in the name of and were being operated on behalf of the Government of The Republic of China by China Merchants Steam Navigation Company, Limited, (CMSN), a corporation wholly owned and controlled by said Government.[5] The company's head office was located at Shanghai until May, 1949, when it was transferred to Taipei, Taiwan, pursuant to government orders (Fdg. 15, R. 70-71; Pet. App. A4). The company maintained a branch office at Hong Kong until defection of most, but not all, of the branch office personnel on January 13, 1950 (Fdg. 17, R. 71; Pet. App. A4).

During the latter part of 1949, prior to the loss of the vessels as well as prior to British recognition of the Chinese Communist regime, again pursuant to government orders, the port of registry of each of the vessels in question was transferred to a port in Taiwan (Fdgs. 31, 32, R. 75-76; Pet. App. A4)—an important fact not mentioned in the petition.

During 1949, Chinese Communist military forces started to drive southward on the mainland of China; and, as of April 19, 1949, a state of civil war existed between the Government of The Republic of China and the Chinese Communist regime. The Government of The Republic of China itself was also forced to move its capital from Nanking to Canton on April 19, 1949, thence to Chungking and to Chengtu, and finally, to Taipei, Taiwan on December 9, 1949 (Fdgs. 8, 9, R.

[5] Prior to September, 1948, CMSN functioned as an unincorporated company. On September 9, 1948, the company was reorganized into a limited stock company (Fdgs. 11, 12 and 13, R. 70).

68-69; Pet. App. A3). As noted by the Court of Appeals, since December 9, 1949, the Government of The Republic of China "has continued to operate on Taiwan as a sovereign entity." (Pet. App. A3). "That government, although now driven from the mainland, is still in existence and is in complete control of the island of Taiwan and its inhabitants . . ." (Pet. App. A17). "It is recognized by the United States as the only proper and lawful government of China and its officials are the accredited representatives of The Republic of China in the United Nations." (Pet. App. A3). Indeed, more than 50 nations still recognize the Government of The Republic of China.

The British Government recognized the Communist regime as the *de jure* government of the mainland of China as of midnight, January 5/6, 1950.[6] It is important to note, however, that the British have never recognized that the Chinese Communist regime was in *de facto* or *de jure* possession or control of Taiwan (Fdg. 25, R. 73-74). Attention is further invited to the conclusion of the Court of Appeals that ". . . no fiat of the British Government promulgated in the interest of its colonial possessions in the Chinese area can alter these facts or nullify the actual existence of a government (The Chinese Nationalist Government) *which is functioning as an independent nation.*" (Pet. App. A17).

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[6] It should be noted, particularly when reading the opinions below, that references to "The Republic of China" do not thereby encompass any international entity connected with the Chinese Communist regime, since that regime is designated as "Central People's Government of the People's Republic of China" and the Communist state is entitled "People's Republic of China." (Thomsen, R. 6; Pet. App. A4).

B. The Insurer and the Policies

Since 1946 and 1947, when the vessels were sold by the United States to "The Government of The Republic of China, all marine and war risk policies were placed with petitioner, National Union Fire Insurance Company of Pittsburgh, which is an American company, represented by a syndicate referred to as "AIU" (Thomsen, R. 8; Blue R. 60a-61a)[7].

From the very beginning, petitioner insurer knew that the vessels had been sold to "The Government of The Republic of China" (Thomsen, R. 29; Pet. App. A17-A18) The named insured in all of the policies is "The Government of The Republic of China represented by Universal Trading Corporation". The policies also provide that losses, if any, are payable to the United States Maritime Commission or the Export-Import Bank for distribution to itself and to "The Government of The Republic of China" as their interests might appear (Pet. App. A4-5).

Petitioner conceded at the trial that it "recognized the Government of The Republic of China as owner of the fleet of vessels covered by the policies" (Fdg. 30, R 75; Pet. App. A4). Petitioner insurer "knew that the head office of CMSN had been transferred to Taipei and knew that CMSN was operating the ships as an agency or organ of the Nationalist Government. (Insurer) dealt with it as such. Before and after October

[7] American International Underwriters, Ltd. (one of the AIU companies and the company which actually signed the policies) is a Hong Kong company, maintaining offices in Hong Kong, as well as on the mainland of China at all material times. It always acted as underwriting and claims agent for the petitioner insurer. All knowledge by AIU was knowledge of the petitioner (Fdg. 27, R. 74).

1, 1949,[8] and January 5, 1950, premiums on the policies in question were paid to the respondent out of the funds of the Nationalist Government" (Thomsen, R. 9)[9]. Insurer knew of the transfer of the seat of the government to Taiwan, and certainly was currently informed of military and political events taking place on the mainland of China.

Moreover, on January 17, 1950, insurer was advised of the hoisting of the Communist flag on vessels in the port of Hong Kong. Nevertheless, it thereafter continued to transact insurance business, including payment of damage and loss claims, with the CMSN head office in Taipei, and renewed some of the policies covering the vessels in question as well as other Chinese Government vessels (war risk coverage was renewed on a monthly basis) (Fdgs. 30, 502, 506; R. 75, 109-110), and continued to accept and to retain premiums on the policies (Pet. App. A4). Indeed, insurer continued to issue policies naming the Government of The Republic of China as the insured until 1957.[10]

The policies were valued policies and insured the vessels in the following amounts. HAI HSUAN, $550,000; TENG KENG, $372,075; CHENG KUNG, $470,000; CHIAO JEN, $470,000; HUNG CHANG, $470,000; TSAI ER, $342,375; and LIN SHEN, $342,375.

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[8] On or about this date the Communist regime proclaimed itself a government.

[9] See also Court of Appeals opinion, Pet. App. A4, for similar findings; also Fdgs. 28, 29, 30, R. 75; Fdgs. 502, 506, R. 109-110.

[10] Policy coverage with respect to the seven vessels in question was terminated as of April 1, 1950, but the same policies thereafter continued to cover other vessels owned by the Chinese Government.

Both the marine and war risk policies were placed with the same insurer in order to obtain full coverage and avoid the difficulties which have frequently arisen where the marine risks and war risks are covered by different insurers (Thomsen, R. 10). In respect to the instant policies, insurer reinsured about 80 per cent of the marine risks and at least 90 per cent of war risks with other companies, primarily in London (Fdg. 507, R. 111; Blue R. 62a-63a).

The marine policies contain the traditional "perils clause" insuring against:

> "Perils . . . of the Seas, . . . Enemies, Pirates . . . Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, *Barratry of the Master and Mariners,* and of all other like Perils, Losses and Misfortunes . . . excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement." (Italics supplied)

The F. C. & S. ("Free of Capture and Seizure") clause in the marine policies excludes claims for loss, damage or expenses—

> "resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the vessel, by requisition or otherwise; whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations . . . Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy."

In the policies insuring against war risks, the principal insuring clause reads in pertinent part as follows:[11]

> "It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty".
>
> "This insurance is also subject, however, to the following warranties and additional clauses:—
>
> "*The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife*".
>
> * * *
>
> ". . . warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured . . ." (Italics supplied)

The war risk policies also contain a *typewritten clause* which reads:

> "Excluding Capture and Seizure."

The marine and war risk policies contain the usual trading warranties which were modified from time to time to exclude ports in China occupied by the Communists. Originally, they read "Warranted no voyage to ports in China not in control of the *Government of The Republic of China.*" Later they were changed to "worldwide excluding the Baltic Sea, Black Sea and China north of Amoy, or held covered at additional premium to be arranged." On January 17, 1950, after

[11] For text of the Hulls (War Risks) provisions form, see Blue R. 125a. The layer upon layer of complicated riders, attachments, etc., are too bulky to reproduce here.

the defections in Hong Kong, the warranty was further changed to read: "world-wide excluding China *other than Hong Kong,* Formosa and Macao or held covered at additional premium to be arranged" (Thomsen, R. 12, 41-42; Pet. App. A5).

Thus, even after the defection, the insured continued to regard the port of Hong Kong as a safe port for vessels of "The Government of The Republic of China."

Petitioner's assertion (Pet., p. 8) that "petitioner, considering the indirect and limited protection against the risk of loss of possession of the vessels to the Communists afforded by the trading warranty to be inadequate, negotiated with the assured's brokers as a result of which there was added to the war risks policies the typewritten clause 'excluding capture and seizure'" is both misleading and incorrect. See for example the broker's testimony at Blue R. 59a-60a. As noted by both the District Court (R. 41-42) and the Court of Appeals (Pet. App. A5), the purpose of the trading warranties was to prevent the ships from going to ports in China "where they were in danger of being captured, seized or detained by Communist troops, ships or port officials" (Thomsen, R. 41-42).

In respect to the typewritten clause in the war risk policies "excluding capture and seizure", the District Court, based upon *all* the evidence of record, found: "In June, 1949, when the communist armies were rapidly extending their conquests down the coast of China, the clause 'excluding capture and seizure' was added to the war risk policies, evidently because the insurers feared that the ships would trade so near the coast of China that they might be captured by com-

munist gunboats or sampans, whether operated by the communist navy, port authorities or others, and because a clause which merely excluded certain ports would rapidly become obsolete."[12] This finding (as were all pertinent findings of fact) was concurred in by the Court of Appeals. See Pet. App. A5.

Although petitioner presented no witnesses at the trial to testify on any of the factual or legal issues, it took two steps in May 1950 (less than a month after it received the loss claims on the seven vessels) which are of considerable importance in construing the exclusionary clauses and also barratry coverage under the policies. First, in May, 1950, in an effort to avoid future liability for barratry losses on other vessels, it modified the war risk policies in question to "physical loss and damage only" (Fdg. 508, R. 111-112; Blue R. 67a-68a). Then, realizing that barratry was still covered under the marine policies, by letter dated May 11, 1950, insurer asked if the insured would agree to "exclude from marine policies risk, barratry and piracy as well as capture and seizure" (Lib. Exh. 146 id, Blue R. 100a), which the respondents refused to do (Blue R. 68a-73a, 101a).[13]

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[12] As was so properly noted by the District Court (Thomsen, R. 42), "If the insurer had feared the masters and mariners of the ships themselves, as well as the communist gunboats and port officials, and had wished to be free of the risk of defection by the masters and mariners, the insurer could have excluded barratry from the risks assumed, or could have inserted a clause clearly excluding a loss caused by the defection of masters or the mariners."

[13] This was an attempt to modify existing marine policies which were issued on an annual basis. The particular letter was ruled inadmissible by the District Court. Respondents contended the ruling to be error before the Court of Appeals (Libelants' Assign-

Against this background, the Courts below considered the events relating to and resulting in the losses of the vessels in Hong Kong and the HAI HSUAN, which we shall now summarize.

C. The Six Hong Kong Vessels

During November and December, 1949, and January, 1950, 13 vessels owned by the Government of The Republic of China and operated by CMSN were in or sailed into the port of Hong Kong. Among them were six of the vessels which are the subject of this litigation, namely, the CHENG KUNG, CHIAO JEN, HUNG CHANG, TENG KENG, LIN SHEN, and TSAI ER. These vessels, which will hereafter be referred to as the Hong Kong vessels, remained in that port continuously from the period November/January, 1950 until September, 1950, when they sailed for Canton (Thomsen, R. 12; Pet. App. A6). We note, incidentally, that there is no evidence of record to support petitioner's assertion (Pet., p. 11) that the vessels were ultimately "ordered" by the Communist regime to go to Canton.

From November 13, 1949, until January 16, 1950, Mr. W. H. T. Wei, General Manager of CMSN, whose office was in Taipei, Taiwan, sent many messages by cable, radio and by hand, to the company's Hong Kong branch office and also directly to the masters, officers, and crews of the ships in Hong Kong, ordering the masters, officers, and crews to sail the vessels, including the six in question, out of Hong Kong and either return

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ment of Errors, No. 4, Blue R. 121a). See 3 Corbin *Contracts* (1951) Sec. 558; *Cutting* v. *Bryan*, 30 F. 2d 754, 757-758 (C.C.A. 9, 1929). The Court of Appeals apparently did not consider it necessary to pass upon the point.

to Taiwan or sail to Japan or the Philippines. Among said orders was a lettergram dated December 27, 1949 (Lib. Exh. No. 76; R. 91), from the Ministry of Communications, and a cable of the same date from Mr. Wei (Lib. Exh. No. 78; R. 92), advising that the British Government reportedly planned to recognize the Chinese Communists on January 2, 1950, and ordering the vessels in Hong Kong immediately to sail to Taiwan ports or to Japan or the Philippines (Fdgs. 213-226, R. 83-97; Thomsen, R. 13; Pet. App. A6).

Instead of obeying these orders, during the period November, 1949 to January, 1950, "there were innumerable discussions among the masters, officers and crews, respectively, and between representatives of the several groups; separate meetings of masters, deck officers, radio operators, pursers, and others were held in various restaurants in Hong Kong during December and early January. These meetings proceeded in typical Chinese fashion, with no vote, but a clear sense at the end of each meeting that most of those present were opposed to sailing to Taiwan or Japan, and were in favor of declaring allegiance to the communist regime at the appropriate time." (Thomsen, R. 13).

Not only does petitioner fail to mention these meetings, but it also attempts to create an erroneous impression that the masters, officers and crews defected primarily because their families were living on the mainland and would have suffered "retaliatory penalties" (Pet. pp. 9 and 10). In fact, the District Court found upon *all* the evidence (which was based upon the depositions of officers and seamen who had returned to Taiwan and who attended the meetings, discussions, etc., in Hong Kong) that the reasons for the disobedience of orders and for the defection were as follows:

"The masters, officers and crew were reluctant to go to Taiwan and wished to remain in Hong Kong for the following reasons: (1) they were afraid their ships might be requisitioned by the military authorities on Taiwan; (2) they feared that if they went to Taiwan they would not be allowed to leave, but if they remained in Hong Kong they might be able to operate their vessels to ports in Southeast Asia and earn better pay; (3) the families of many of the men were living in Shanghai or other areas on the mainland under the control of the Chinese communists, and they were afraid that if they went to Taiwan, their families might suffer at the hands of the communists, or that they would not be able to send money to their families; (4) it was reported that the cost of living on Taiwan was very high and the living conditions very bad; (5) they wanted to remain in Hong Kong to see what the British were going to do; (6) they believe that Taiwan would soon fall into the hands of the communist regime; (7) they objected to the inter-guarantee orders of the Nationalist Government on Taiwan, which required that the behavior of each person coming to Taiwan be vouched for or guaranteed by other persons; and (8) the younger men were afraid they would be drafted into military service." (Thomsen, R. 14).

We parenthetically note that petitioner's statement that the masters and mariners by reason of their "domicile" became "citizens" of the Communist Republic (Pet., p. 10) is not supported by any evidence of record. Indeed, a reading of all of the depositions of the men who returned to Taiwan would reveal that a number of the masters and mariners had residences in Hong Kong. See, for example, Blue R. 91a. This Court can also take judicial notice of the fact that overseas Chinese are not necessarily citizens of the entity controlled by the Communists.

Moreover, petitioners have failed completely to point out to this Court the findings of the District Court (Thomsen, R. 14) and that of the Court of Appeals (Pet. App. A6), which establish beyond question that the disobedience of orders and the hoisting of the Red flag was the *voluntary* act of the masters, officers and crews, and that two ships in fact did sail from Hong Kong to Taiwan in January and February, 1950, after the defection (See also Fdg. 214, R. 92-93).

Petitioner's summary of the circumstances relating to the hoisting of the Communist flag (Pet., p. 10) is also misleading and inaccurate. As noted by the District Court:

> "... On the evening of January 15, Tso Wen-yuan, master of the Tsai Er, accompanied by three or four officers of other vessels, distributed flags of the Communist Government to the masters of the other ships ... The personnel of the Hong Kong office, having already defected, *purported* to give orders that the flags be changed; but *it is clear that Captain Tso of the Tsai Er was a ringleader in the conspiracy, and that the masters of all six vessels changed the flags voluntarily as a result of an agreement previously reached among themselves. The decision* of each master to defect to the communist regime and to change the flag *was his own deliberate decision*, made for some or all of the reasons outlined above, and induced in varying degrees by arguments and pressures employed and exerted by communist agents." (Thomsen, R. 16) (Italics supplied).

Petitioner asserts (Pet. p. 10) that Communist Government agents were operating not only in Hong Kong, but also on both the vessels. It fails to point out, however, that the presence of "agents" on the ships was admittedly only *inferred* by the District Court (Thom-

sen, R. 14). Neither does petitioner mention the following conclusions of fact arrived at by the District Court based on *all of the evidence* of record.

> ". . . there was no show of force or threat of violence by the communist troops or agents or by anyone else . . . Neither does the fact that communist agents on the ships or in Hong Kong may have persuaded some of the masters and others to refuse to sail to Taiwan and to take or acquiesce in the final action of changing the flags. There is no evidence that any communist agents went beyond argument and persuasion in securing the defection of the masters and mariners. No doubt the men were made acutely conscious of the fact that their families lived in Shanghai or other areas controlled by the communists; but there is no evidence that any reprisals were actually threatened if they did not change sides." (Thomsen, R. 43-44).

At p. 9, the petition refers to the purported order of January 9, 1950 by the Communist regime relating to Chinese personnel and property in Hong Kong. It is important to note, however, that this so called order appeared in a newspaper published in Hong Kong (Thomsen, R. 15), as well as the finding of the District Court that "no order to 'take over' the ships was offered in evidence" (Thomsen, R. 31). Futhermore, there is no evidence that the masters and crews acted pursuant to any such "order". Note also the conclusion of the Court of Appeals (Pet. App. A7) that: "However, while the vessels were at Hong Kong, no document or other paper was filed with the Government of Hong Kong showing any change in the port of registry, owner or flag of any of the six vessels."

Petitioner's reference at p. 11 to the remarks of counsel for the Chinese respondents is completely out

of context. At no time during trial did counsel for any of the respondents concede that only the events occurring on the date the Communist flag was hoisted should be looked to in determining liability under the policy. On the contrary, their consistent position has been that respondents are entitled to recover on the grounds, among others, of the barratrous acts committed prior to the hoisting of the Communist flag. See R. 211. Furthermore, see the District Court opinion in which it was stated that "the masters and many of the mariners of the six Hong Kong vessels were guilty of barratry in December, 1949 and January, 1950 in failing or refusing to sail to Taiwan or Japan as ordered", as well as "running up the Red flag and holding the ships for the Communist Government", and that "these barratrous acts, . . . *caused* the constructive total loss of the vessels . . ." (Thomsen, R. 27).

D. The Hai Hsuan

Again, as in the case of the Hong Kong vessels, the petition fails to present to this Court all of the pertinent facts, which are set forth in considerable detail in the District Court opinion (Thomsen, R. 16 et seq.), and which are summarized by the Court of Appeals (Pet. App. A7-8) as follows:

"The HAI HSUAN, unlike the other six vessels, was on the high seas proceeding easterly through the Indian Ocean bound for Japan at the time of the British recognition of the Communist Government and at the time of the defection of the personnel in the Hong Kong office. The officers and crew of the ship learned of these incidents through British radio broadcasts. The master received orders (by

radio from the head office at Taiwan not to stop at any British port and to proceed at all possible speed to Taiwan. He was anxious to comply but the crew objected, first arguing through the officers for a stop at Hong Kong then later pressing for Singapore. The master was advised by a member of the crew that the chief engineer was leading a plot against him and trying to convince the other officers and mariners that the ship should be kept from going to Taiwan. A radio dispatch was received from the communist-controlled Hong Kong office to put into Singapore and the officers and crew held a meeting to decide which orders to follow. The master informed the gathering that his orders alone should be obeyed. He decided that the ship should not go to Singapore. But, when the ship was 100 miles west of Singapore, the chief officer threatened to stop the engines if no call was made at that port. The master gave no heed to this statement but on the following day, January 23, when Singapore was thirty miles distant, the engines stopped and the master, several days without food and apparently quite ill, radioed Taiwan that he was sick in bed and requested orders. In reply the head office, unaware of the situation on board the ship, instructed the chief officer to assume command and proceed to Taiwan. Instead, he put into Singapore on January 24, and on January 26, after the master had been admitted to a hospital on shore, having left behind all papers, log books and radio messages, the communist flag was raised over the vessel. The wages of the crew were thereafter paid by the communists in control of the Hong Kong office. On February 1, China Merchants instructed Paul H. Paulsen, master mariner, to take command of the vessel in Singapore. Unable to get

police protection from the harbor authorities, he mustered a skeleton crew and, unarmed, boarded the ship. Upon request that the ship be turned over, the Chinese crew voted a refusal and grew belligerent. Captain Paulsen then abandoned the venture and took his men ashore."

Attention is also invited to the fact "that the officers and crew wanted to go to Hong Kong to take advantage of the cheap prices there and transmit money to their families in Shanghai." (Thomsen, R. 17). See also the arrival report filed with Singapore Harbor Authorities by the Chief Mate on January 24 (Libelants' Exh. No. 51; also Fdgs. 129-130, Blue R. 109a), two days before the Communist flag was hoisted in which report it was stated that the vessel's home port was Kaohsiung, Taiwan, and that the owner was CMSN.

As in the case of the Hong Kong vessels, the petition herein ignores all of the barratrous acts which preceded the hoisting of the Red flag on January 26, 1950 on the erroneous assumption that such acts merely constituted a barratrous delay. (Pet. p. 9). In this connection, see the following statement by the District Court (R. 27):

> "Many of the officers and crew of the HAI HSUAN were guilty of barratry in refusing to sail to Taiwan, stopping the engines in Singapore Straits, threatening Captain Hsueh, sailing into Singapore harbor in violation of the orders given to the master by the owner and transmitted by him to the mariners, running up the red flag, and refusing to turn the ship over to Captain Paulsen".

Referring to the message of January 23, 1950, in which the head office of CMSN in Taiwan directed the chief officer to take over command of the HAI HSUAN

because of Captain Hsueh's reported illness and to sail her directly to Taiwan, the District Court concluded that by January 23, 1950,

> ". . . the *mutinous* officers and crew *had already* assumed practical control of the ship . . ." 151 F. Supp. 211, 228 (R. 28) (Italics supplied)

Further on the District Court, referring both to the HAI HSUAN and to the six Hong Kong vessels, correctly held that:

> "The Chinese masters and mariners were employed by CMSN, a corporate agency of the Nationalist Government. They were paid by that agency, and had custody of its ships as its officers or employees. The ships were flying the flag of the Nationalist Government until January 16, 1950 (January 26, in the case of the HAI HSUAN). Under the laws of the Nationalist Government, to which they owed allegiance, *they were bound to obey the orders of General Manager Wei. Any willful failure to do so was barratry*, under Chinese, British, and American law." (Thomsen, R. 32). (Italics supplied)

In respect to the cause of the loss of the HAI HSUAN, as well as the six Hong Kong vessels, the Court of Appeals, in distinguishing *Cory* v. *Burr*, (1883) 8 App. Cas. 393, held as follows (Pet. App. A15):

> ". . . This holding *distinguishes the decision from the instant case where it has been found that the barratrous acts constituted the ultimate and efficient cause of the loss* of the Hong Kong ships, since it was brought about by the voluntary acts of the masters and crews in possession and was not compelled by the superior forces of the Communist Government. This is the more clear in the case of the Hai Hsuan since the defection of her crew

began on the high seas beyond any possible reach of the communist forces." (Italics supplied)

DECISIONS BELOW

After extensive trial, including many preliminary hearings, the District Court rendered a full and carefully considered decision holding the petitioner liable for the loss of the Hong Kong vessels on the ground that the acts of the masters and mariners during the period November, 1949 and January, 1950, including the hoisting of the Communist flag, constituted "barratry" and not "seizure" and were the cause of the losses (R. 27; Pet. App. 15). In holding that there was no "seizure" within the meaning of either the marine or war risk policies, the District Court considered not only the case of *Greene* v. *Pacific Mutual Ins. Co.* 91 Mass. (9 Allen) 217 (1864), but also other precedents, including the cases now cited by petitioner, and the context of the documents and of the transactions surrounding issuance of the policies. On the basis of *all the circumstances* involved, the Court concluded that the word "seizure" cannot be applied to any barratrous act of the master, and "he cannot be justly said to seize that which is in his own keeping"; and further that "If an insurer wishes to exclude coverage for the barratrous act of the master in changing sides in a civil war, . . . it should say so explicitly and not rely upon such ambiguous clauses as we face in these cases. The policies were prepared by the insurer and its agents; any ambiguity must be resolved against the insurer" (Thomsen, R. 44-45).

The District Court further noted that the losses of the Hong Kong vessels were covered under the clause in the War Risk policies insuring against "the risks . . .

civil war, revolution rebellion, insurrection or civil strife arising therefrom"; but it expressed this view "only because there were different reinsurers" (Thomsen, R. 46). Although discussed, the petitioner did not request the District Court to resolve any possible controversy between reinsurers as to which policies covered.

In respect to the HAI HSUAN, the District Court, although finding that the loss was caused by the barratrous acts of the officers and crew, also concluded that such acts were a "seizure" within the meaning of the policies, thus relieving petitioner of liability, on the ground that the *Greene* case "recognizes the distinction between 'the possession and control' of the ship by the master and the 'qualified possession' by the mariners" (Thomsen, R. 45).

The *Greene* case, however, squarely held that there can be no "seizure" by the officers and crew. On appeal, the Court of Appeals for the Fourth Circuit affirmed the District Court's decision with respect to the Hong Kong vessels and reversed with respect to the HAI HSUAN, pointing out that it was unable to accept the distinction made by the District Court between the possession and control of the ship by the masters and the qualified possession by the crew (Pet. App., A13). In so deciding, it quoted with approval the statement of Chief Justice Bigelow in the *Greene* case that: " 'If they violate their duty and disobey the master, displace him from command and assume entire control of the vessel, it is a breach of trust rather than a seizure' " (Pet. App., A14).

In addition to noting that the cases relied upon by petitioners below (and in the instant petition) are not

apposite (Pet. App., A14-A18), the Court of Appeals further concluded that the characterization of an act as barratrous is independent of the motives which provoked the act", and therefore that there was no merit to insurers' contention that barratry cannot encompass acts of masters and mariners who change sides in a civil war (Pet. App., A18)[14]

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

Barratry is covered by the marine policies, and it is respondents' position that one need not look beyond the marine policies in order to hold petitioner liable. In any event, the war risk policies insure against the risk of barratry arising out of or consequent upon "civil war, revolution, rebellion, insurrection or civil strife". In this connection, it will be noted that the marine and war risk policies "are complimentary and were placed with the same insurer in order to obtain full coverage except for the items specifically excluded, and to avoid the troublesome questions that arise so often when the two policies are issued by different insurers" (Thomsen, R. 10). Therefore, whether barratry is covered under the marine or war risk policies is of no consequence, except as between the reinsurers, with which question we are not here concerned.

Consequently, the basic issue involved in this litigation (apart from the possibility of holding petitioner liable under the provision in the war risk policies insuring against the risks of civil war, etc., regardless of

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[14] The classic definition of barratry by Lord Ellenborough in *Earle* v. *Rowcroft*, (1806) 8 East 126, 138 (quoted by the Court of Appeals, Pet. App., A8-A9) points out that motive is an immaterial factor.

barratry) is whether the acts of the masters and mariners constituted barratry, for which petitioner would be liable under either the marine or war risk policies, or whether such acts constituted a "seizure" within the meaning of the F. C. & S. ("Free of Capture and Seizure") warranty in the marine policies or the typewritten clause in the war risk policies "excluding capture and seizure".

A. As to Barratry

There is no need for clarification of the term "barratry". Its meaning has been long established (the leading decisions and other authorities are reviewed by the District Court, R. 26-27, and by the Court of Appeals, Pet. App. A8-A9).[15] Briefly, it covers a breach of trust or duty by the master or mariners, regardless of motivation. And it is clear beyond question that, in the instant cases, the acts of the masters except the master of the HAI HSUAN) and mariners constituted barratry, and that their deliberate, voluntary and barratrous conduct caused the loss of the vessels, as both lower Courts so found (R. 27; Pet. App. A15).

Petitioner's contention (Pet., pp. 28-32), that the Court of Appeals opinion leaves in vague and "very generalized terms the question of what is . . . barratrous conduct within the coverage against war risks" which "can only cause future confusion" unless clarified by

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[15] Note also *Earle* v. *Rowcroft*, (1806) 8 East 126, 136, 103 Eng. Rep. 292, 296, wherein, Lord Ellenborough, after giving the classic definition of barratry, further said:

> ". . . I make no question that there may be such a deviation as will amount to barratry; as where the master deviates to . . . throw the ship into the enemy's hands. . ."

this court (Pet., p. 32), is without merit for several reasons. First, petitioner did not request the Court of Appeals, or even the District Court, to make such a determination in the event it found insurer liable.[16] Second, since the marine and war risk policies are complimentary and were placed with the same insurer, the particular point would have been, and is, of academic interest only. See in this connection *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, where this Court, in discussing Rule 19 observed that "it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic".

True, the District Court observed that the losses in respect to the six Hong Kong vessels were covered by the clause in the war risk policies insuring against the risks of "civil war, revolution, rebellion, insurrection or civil strife" (R. 46). However, in making this observation, the District Court noted that "the question is important *only* because there were different reinsurers" (R. 46). It is submitted that a possible conflict between reinsurers does not justify granting the petition.[17]

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[16] Petitioner conceded during trial that it "would be liable under the war risk for 4-B" (Tr. 1620). Item 4-B, which was one of a series of questions posed by the District Court, requested the parties to state their position in respect to a loss resulting from "barratry consequent of civil war—no capture and seizure".

[17] At the District Court level, petitioner refused to disclose the name of the reinsurers on the ground they were not in privity and the information was irrelevant (See Libelants' Assignment of Errors, No. 10, Blue R. 122a).

Neither is there any conflict between the Court of Appeals ruling that barratry was committed and the statement of this Court in *Guaranty Trust Co. v. U. S.*, 304 U.S. 126, 137 that "the rights of a sovereign state are vested in the state rather than any particular government", as asserted at pp. 32-33 of the petition.[18] First, The Republic of China and its government (as distinguished from the "Communist People's Republic of China") does exist as an independent nation,[19] as noted by the Court of Appeals (Pet. App. A17). Second, the vessels were registered at ports in Taiwan and were flying the Nationalist flag. See *Lauritzen v. Larsen*, 345 U.S. 571, 583 et seq. where this Court points out that the law of the flag and port of registry governs the relations between owner and crew, and not the law of the port where the vessel is temporarily at anchor. Third, the British have never recognized the Communist regime as being in *de facto* or *de jure* control of Taiwan. Fourth, before, during and after the losses of these vessels: (a) petitioner knew that the vessels had been sold by the United States to "The Government of The Republic of China"; (b) petitioner recognized "The Government of The Republic of China" a the owner of the vessels; (c) petitioner was well aware of the long existing conflict in China between the Communists and the recognized Nationalist

[18] From this proposition, petitioner erroneously contends that, since the vessels were in Hong Kong, and since the British recognized the Communist regime, no duty was owed by the masters and mariners to the Government of The Republic of China.

[19] A state or international person exists where: (a) there is a people; (b) there is a country in which the people are settled down—no matter what its size; (c) there is a government; (d) the government is sovereign. 1 Oppenheim, *International Law* (2d ed.) pp. 108-109.

Government; (d) petitioner knew The Government of The Republic of China and CMSN were located on Taiwan during 1949; and, (e) before, during and after the losses, petitioner continued to transact insurance business, including payment of damage and loss claims, with the CMSN head office in Taipei, Taiwan. As noted by the Court of Appeals (quoting with approval the District Court): "With knowledge of these facts, respondents, both before and after October 1, 1949, and after January 5, 1950, issued policies of insurance to the Government of the Republic of China as the named insured and accepted premiums thereon. Respondents *are estopped* to deny that the ships were owned by the Government of the Republic of China, the Nationalist Government, as distinguished from the sovereign state or national entity, China. . . ." (Pet. App. A18; also Pet. App. A4). Fifth, even after the defection, petitioner continued to issue policies naming the Government of The Republic of China as the assured, and as evidenced by the trading warranties (supra, pp. 10-11), insured against losses that might occur in the port of Hong Kong. Sixth, if British recognition of the Communists divested the Government of The Republic of China of property rights in the vessels, which is denied, the losses would be attributable to, and recoverable under the policies by reason of, the preceding acts of barratry. Seventh, the United States holds mortgages on these vessels. Consequently, carried to its logical conclusion, petitioner's contention (which reduces itself to the proposition that th Communist regime should be regarded as owner) would place the United States in the embarrassing and untenable position of a mortgagee with a government it has consistently refused to recognize. Eight, the *Guaranty Trust Co.* case, 304 U.S. at 231, affirms the rule that recogni-

tion by the United States of a foreign government is conclusive in all courts in this country.[20] Accord, *United States* v. *Pink*, 315 U.S. 203, 229-230.

B. As to Capture and Seizure

Neither are there any "special and important reasons" which require this Court to pass upon the remaining issue, i.e., whether the barratrous acts of the masters (except for the master of the HAI HSUAN) and mariners constitute "seizure" within the meaning of the F. C. & S. ("Free of Capture and Seizure") warranty in the marine policies or the typewritten clause in the war risk policies "excluding capture and seizure".[21]

The precise issue was resolved 94 years ago in what the Court of Appeals describes as the "*celebrated and*

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[20] See Lib. Exhs. 104 and 106 (Fdgs. 509 and 510, R. 112) for State Department certifications issued in the present litigation, refusing, inter alia, to recognize that any ownership rights were acquired in the vessels by the Communists.

[21] It will be observed that petitioner is liable under the marine or war risk policies if the losses occurred as a result of: (a) barratry; (b) barratry as a consequence of civil war, etc.; (c) consequences of civil war, etc., regardless of barratry; (d) if barratry leads up to or is a concurrent or co-operative cause of the losses. *Calmar* v. *Scott*, 209 F. (2d) 852, 857 (2 Cir., 1954); 2 Arnould *On Marine Insurance* (14th ed., 1954) sec. 858; Hugh Mullins, *Marine Insurance Digest* (1951), p. 21; *Lanasa Fruit Co.* v. *Universal Ins. Co.*, 302 U.S. 556, 564-565; *Pike* v. *Merchants' Mutual Insurance Co.*, 26 La. Ann. 392, 397 (1874); *American Insurance Co.* v. *Dunham*, 12 Wend. (N.Y.) 463, 468 (1834); *Waters* v. *Merchants' Louisville Ins. Co.*, 11 Peters (36 U.S.) 213; *Vallejo* v. *Wheeler*, 1 Cowp. 143, 98 Eng. Rep. 836, 843-844; *Dixon* v. *Reid*, (1822) 5 *Barn. & Ald. Rep.* 597, 106 Eng. Rep. 1309; *Roscow* v. *Corson*, (1819) 8 Taunt. 684, 129 Eng. Rep. 550; *Mentz, Decker & Co.* v. *Maritime Ins. Co., Ltd.*, (1909) 16 Com. Cas. 17

widely cited opinion of Chief Justice Bigelow in *Greene v. Pacific Mutual Ins. Co.*, 91 Mass. (9 Allen) 217 (1864)" (Pet. App. A9), where it was held that the word "seizure" cannot be applied to the acts of the master or mariners, but is intended to "exempt the insurers from liability to loss arising from a forcible taking of the vessels by *others* than the officers or crew", 91 Mass. (9 Allen) at 222.

The holding in the *Greene* case has been repeatedly cited and accepted by text writers in the United States.[22] The marine underwriting trade in London also shares the same views, as evidenced by the comments in various issues of *Fairplay* (founded in 1883) and *The Post Magazine & Insurance Monitor* (founded in 1840, and the oldest insurance journal in the world) which are reprinted in the appendix hereto. As noted in the July 25, 1957 issue of *The Post Magazine & Insurance Monitor* (App., p. 10a):

> "If it is so patent that barratrous seizure is excluded by the F. C. & S. clause, it is astonishing that underwriters in this market have never adopted that line of defense. . ."

As noted by both courts below (Pet. App. A13; Thomsen, R. 39), it is obvious that underwriters of marine insurance, their technical advisers and brokers have been long familiar with and have understood that the phrase "capture and seizure" cannot apply to barratrous acts of the master or mariners.

[22] 1 Phillips, *Insurance* (5th ed.; 1867) p. 652; 1 Parsons *Law of Marine Insurance*, (1868) 554; Richards *On Insurance* (4th ed., 1924) p. 834; 5 Appleman, *Insurance Law and Practice*, (1941) sec. 3256, note 37; also, *38 Words and Phrases* p. 526 under "Seizure, marine insurance"; 57 Corpus Juris, *Seizure*, Sec. 3, p. 105, under "Seizure special maritime sense"; and 45 C.J.S., *Insurance*, Sec. 863, p. 939.

There is no merit to petitioner's contention (Pet., pp. 33-38) that the decisions below are in conflict with those of the House of Lords in *The Minden*, 1942 A.C. 50 and *Cory* v. *Burr*, (1883) 8 App. Cas. 393. These decisions do not involve the issue of "barratry" versus "capture and seizure" which is involved in the present litigation, and are not apposite for the reasons noted by the Court of Appeals (Pet. App. A14-A15). We concur with the views set forth in the brief in opposition filed herein by the Solicitor General in respect to the inapplicability of these two cases, and therefore do not here comment further except to note: (a) that the holding in *Cory* v. *Burr*, concerned only with the proper rule of causation, has been severly criticized in England; see Arnould *On Insurance* (14th ed., 1954) Sec. 858, n. 32; 18 Halsbury's *Laws of England* (2nd ed., 1935) p. 322 note "(p)"; (b) that the marine underwriters in London apparently do not share the views expressed by petitioner, as evidenced by the comments in *Fairplay* and *The Post Magazine & Insurance Monitor* appended hereto; and (c) that "our practice here is no more than to accord respect to *established* doctrines of English maritime law"; see *Standard Oil Co. of New Jersey* v. *United States*, 340 U.S. 54, 59.

Moreover, it will be recalled that the typewritten clause "excluding capture and seizure" was put into the war risk policies by insurer[23] under circumstances which properly resulted in a finding by both courts below that its purpose was to avoid liability in the event of capture by Communist forces, such as gunboats or sampans (Thomsen, R. 42; Pet. App. A5).

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[23] Any doubts must be resolved against insurer. *Calmar S.S. Corp.* v. *Scott*, 209 F. (2d) 852, 856 (2 Cir., 1954).

Finally, the petition should not be granted for the simple reason that any decision rendered by this Court, as well as those of the lower courts, could be nullified by the underwriters by amending the insurance policies, which are short term contracts. In fact, petitioner did not even await a court decision in these cases to make such amendment. In May, 1950, eight years ago, and after the losses had occurred, war risk coverage issued to respondents herein was limited by a rider to *physical loss and damage only*, for the purpose of avoiding liability thereunder for losses based on barratry (Blue R. 68a). Underwriters could and presumably would take steps in respect to coverage issued to shipowners similarly situated, assuming there are any.[24]

It is therefore manifest that a resolution by this Court of the particular issues here involved with respect to these particular policies cannot be and is not "of importance to the public, as distinguished from the parties". *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393.

In terms of the isues involved in the present litigation, therefore, there is no substance to petitioner's assertion (Pet., pp. 19-21) that shipowners and underwriters,[25] have a "vital concern" in knowing what

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[24] So far as known, there is no other litigation pending or threatened involving facts and issues similar to those here presented.

[25] Petitioner's assertion that extension of the *Greene* case to the field of war risk could well result in an increase in premium rates (Pet., p. 19) is pure speculation. Moreover, if policies covering identical risks were issued during the last eight years, it is probable that any justifiable increase in premium rates has long since taken place.

losses by "seizure" come within the "scope of the protection afforded them by the war risks policies", (which is far too broad a task for any court). Neither is there any "uncertainty and conflict as to the meaning and scope of the term 'seizure' in connection with war risk coverage" (Pet., p. 21), which this Court must or can resolve for the benefit of the Secretary of Commerce. We parenthetically note that the Maritime Administration holds the mortgages on four of the vessels, is under the jurisdiction of the Secretary of Commerce, has pressed for recovery on the theories here advanced, and has actively participated in the present litigation.

Contrary to petitioner's assertions (Pet., p. 21), it cannot be seriously contended that the myriad unique set of circumstances which resulted in the losses of the seven vessels is likely to recur and to result in claims under policies identical to those here in question. What seems more apparent, particularly when one measures petitioner's version of the facts against those of the two courts below, is that petitioner's contentions are principally directed to the factual determination of the lower courts. This Court, however, has consistently held that certiorari will not be granted to review concurrent findings by two courts below. *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 51; *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 214; *Allen* v. *Trust Co. of Georgia*, 326 U.S. 630, 636.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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August 4, 1958

APPENDIX A

Barratry or Seizure?

MEMBERS of the British marine insurance market will be interested in a judgment awarded in the District Court of the United States regarding the loss of seven cargo ships to the Chinese Communists in 1950. The facts of this case were that, when the Chinese Government fell, the masters and crews of six ships refused orders of the China Merchants' Company (which was operating the vessels on behalf of the Nationalist Government of China) to return to Formosa and handed the vessels over to the Communists; in the case of the seventh vessel, the crew seized the ship from her master and took her to Singapore. The Government of Nationalist China, the United States Government (which held substantial mortgages on the ships) and the China Merchants' Company sued an American insurance Company for the ships which were lost. The District Judge ruled that the insurer was liable for the amount claimed in respect of the six vessels handed to the Communists because the insurance policies covered "barratrous acts"—which, he said, occurred when the officers and men of the ships acted against the interests of the owners. As regards the seventh ship, the acts committed, said the Judge, were of "seizure," and were not covered by the insurance policies on the vessel; consequently, the claim for the loss of this vessel was excluded from his award.

English Law

THE decision in respect of this seventh vessel will, no doubt, give rise to a great deal of comment in marine insurance circles in this country as the question must inevitably arise whether a similar ruling would have been given by an English Court. It is well established in English law that, if a ship is violently carried out of her course and

fraudulently run away with by the captain and crew, this is a clear case of "barratry" from the moment the ship is so carried out of her course. (Falkner *v.* Ritchie [1814]; Brown *v.* Smith [1813]; Dixon *v.* Reid [1822]). It can be assumed, therefore, that, in respect of the six vessels referred to above, a claim for loss by barratry would be upheld. In the case of the seventh ship, however, the position is somewhat more nebulous. There have not been many decisions as to what would amount to "barratry by the mariners." Section 848 of *Arnould on Marine Insurance* advances the view that, if the captain is compelled by the mutinous violence of the crew to deviate from his course, though in the teeth of express instructions to the contrary, this will not be "barratry of the master" but "barratry of the mariners" (Elton *v.* Brogden [1747]). *Arnould* goes on to say that, where the crew overpower the captain or constrain him to consent to their proceedings, the same acts would be barratry in them as in the master.

Barratry Implied in "Arnould"

The Rules for Construction of the Policy, which are embodied in the First Schedule to the Marine Insurance Act, 1906, give a definition of barratry which is not very helpful in the circumstances of the case under discussion. These Rules declare that "barratry includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer." So far as the risk of "seizure" is concerned, it was held by Lord Fitzgerald in the famous case of Cory *v.* Burr (1883) that "seizure may reasonably be interpreted to embrace every act of taking forcible possession, either by a lawful authority or by overpowering force." Full details of the "seizure" of the vessel referred to above are not yet available in this country, but from the facts which have already been reported there seems to be sufficient indication that, should a similar case be heard in the English Courts, a Judge would rule that a "barratrous" loss had occurred. It would

appear from the judgment which has been issued by the U.S. District Court that, in order to substantiate a claim for barratry it must be proved that the master contributed to or participated in the wrongful act, whereas it is clearly implied in *Arnould* that a loss of the nature in question would be held to be "barratry of the mariners" and therefore recoverable under the terms of the policy concerned

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The Post Magazine & Insurance Monitor June 13, 1957
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MARINE INSURANCE

Barratry

(From our Marine Correspondent)

It is reported that a District Court Judge in the United States has recently decided that the seizure of a vessel by her crew amounts to "seizure" within the meaning of the policy and is therefore an excluded risk under the Free of Capture and Seizure Clause. Until the full judgment is available it may be unwise to jump to conclusions, but from the facts of the case one would have thought that the loss would have been clearly a case of "barratry of the master and mariner," and thus recoverable under the standard form of policy as a loss by *barratry* notwithstanding the F.C. and S. exclusions.

Shortly, it appears that after the Chinese Government fell in 1950, the masters and crews of six vessels defected by handing over the ships to the Communists instead of returning to Formosa in accordance with the instructions of the operating managers. In respect of these six vessels, the District Court Judge agreed that their loss was due to the barratrous acts of the officers and men who had acted against the interests of the owners; in these circumstances, he held that the loss was covered by the policy. In the case of a seventh vessel, however, where the crew seized the

ship from her master and took her to Singapore, the Judge ruled that the loss was due to seizure and was not covered by the policy.

This ruling will undoubtedly provoke considerable comment in this market for, as a correspondent to "Lloyd's List and Shipping Gazette" has declared, barratry as a named peril in a marine policy has never before been qualified by its origin. It is defined in the Rules for Construction of Policy annexed to the Marine Insurance Act, 1906, as including "every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, the charterer," while according to Arnould:—

> "Barratry of masters and mariners being one of the perils insured against, the first question is as to the meaning attached to the word 'barratry.' Guided by the etymology of the word, which seems ultimately to have been derived from the Catalan *barat*, and proximately from the Italian *barratria*, in both of which languages it conveyed the notion of fraud or trick, our Judges for a long time seem to have considered that fraud, or criminal knavery, on the part of the master as against the owners with a view to benefiting himself at their expense was an essential ingredient in barratry as insured against in English policies.
>
> "Lord Ellenborough, however, in an elaborate decision, reviewing all the authorities, established the position that trick or knavery in t' e sense of an imposition practised upon the owners by the master, with a view to promoting his own benefit at their expense, was not essential to constitute barratry in our law; but that any wilful act of known criminality or gross malversation, even though not intended for the owners' prejudice, nay, even though intended for their benefit, would yet, if in fact it operated to their prejudice, by causing the loss or seizure of the ship, be barratry in the master."

To the best of my knowledge, the last case of barratry considered in our Courts was *Marstrand Fishing Co.* v. *Beer* (56 Ll. L. Rep. 163). In that case, the master of a fishing vessel, instructed to fish in the North Sea until a specified date, took her into the South Atlantic. No news of the vessel having been received for six weeks, the owners tendered notice of abandonment to underwriters and claimed a constructive total loss. Subsequently, the vessel arrived off Georgetown, British Guiana, and was arrested. Here, the only question was whether the ship was a constructive total loss, at the time abandonment was declined, within the meaning of the Marine Insurance Act, 1906, there being complete agreement that if, on the balance of probabilities at the material time the vessel was more likely to be lost than recovered, the assured would be entitled to recover the loss as a loss by barratry. In the result, it was the underwriters who gained the day, Porter, J., holding that it could not be said that at the material time the vessel was more likely to be lost than recovered.

The old case of *Cory* v. *Burr* (1883) should not be overlooked, either. Here, a ship was insured under a time policy in the usual form (including the risk of barratry) and was "warranted free from capture and seizure, and the consequences of any attempt thereat." In consequence of smuggling by the master, which amounted to barratry, the ship was seized and detained by Spanish revenue officers. In an action on the policy to recover expenses incurred by the owner to obtain the release of his vessel, it was held that the *proximate* cause of the loss was *seizure* and not the barratry of the master, and that therefore the underwriter was exempted from liability by the warranty.

It seems to me that one ought to discriminate between seizure by the master and members of the crew and seizure by other parties whose acts to the prejudice of the shipowner can in no circumstances constitute "barratry." After all, the assured is entitled to bring a claim against under-

writers under any head he may think fit, and since barratry is a named peril, and includes seizure by the master or crew, surely that ought to be sufficient.

The Post Magazine & Insurance Monitor July 25, 1957

Page 1011

MARINE INSURANCE

Barratry and Seizure

(From our Marine Correspondent)

In my Notes of 13-6-57 I drew attention to a recent decision of the United States District Court in which the seizure of a vessel by her crew, though amounting to barratry, was held nevertheless to be a loss by *seizure* and therefore excluded from the policy by the provisions of the Free of Capture and Seizure Clause. Commenting upon this judgment, I expressed the view that one ought to discriminate between seizure by the master and members of the crew and seizure by other parties whose acts to the prejudice of the shipowner could in no circumstances constitute "barratry." It seemed to me that the loss was recoverable as a loss by *barratry* notwithstanding the F. C. and S. Clause exclusions, barratry being expressly mentioned as an insured peril.

Interesting Letter from New York

These comments have brought forth a most interesting letter from Mr. Oscar Houston, senior partner in Messers. Bigham, Englar, Jones & Houston, counsellors-at-law, New York, in which he takes me severely to task for the views I expressed. It had never occurred to him, he says, that anyone would doubt that it was the purpose and effect of the F. C. & S. Clause (or any other clause excluding seizures) to exclude all seizures. In his opinion, the F. C. & S.

Clause has no purpose except to exclude losses otherwise within the named perils. Continuing, Mr. Houston adds:—

"For instance, 'Piracy' is a named peril, but surely none will doubt that the exclusion of seizure excludes seizure by pirates. Similarly, the exclusion of seizure excludes barratrous seizure.

"The following language appears in the opinion of the Lord Chancellor in *Cory* v. *Burr* at 8 App. Cas. p. 397:

'Suppose the case of a belligerent capture: that belligerent capture is as much attributable to 'men-of-war' or to 'enemies,' 'takings at sea,' as any seizure by reason of barratry can be attributed to barratry—indeed, more directly and immediately . . . Then the argument, if it is sound as to barratry, would seem to be as sound as to 'men-of-war' and 'enemies' also, that because there is an express insurance against those things, therefore a 'capture or seizure' and consequently an attack by 'men-of-war' of by 'enemies' is to be taken out of the warranty . . . It is quite manifest that *the object of this warranty is, and must be to exclude such losses, otherwise covered by the policy, otherwise coming within the express terms of the policy, as arise out of and are losses occasioned by 'capture or seizure.'*

"In the case of *Kleinwort* v. *Shepard*, 1. El. & El. 447, 120 Reprint 977, the Court, construing the F. C. & S. Clause said:—

'If the crew, intending to turn pirates, were to murder the captain and run away with the ship, would not this be a loss by seizure?'

"Perhaps the idea was best expressed by Justice Strong of the Pennsylvania Supreme Court in *Fifield* v. *Insurance Company* (sic) 47, Pa. 166 (1864) when he said, p. 177:

'The underwriters undertook against such piracies only as were not captures'."

These extracts from Mr. Houston's letter give the substance of his observations, which he concludes with the comment that I owe it to my readers to clear up the basic misconception of the purpose and effect of the F. C. & S. Clause as revealed in my previous article.

Some Doubt

If I were convinced beyond all reasonable doubt that "seizure" in the F. C. & S. Clause excludes a barratrous seizure of the vessel by the master or crew, I should be only too happy to retract, and admit my error. As things are, I am by no means alone in the views I have expressed, and at least one prominent average adjuster has come to my support. On the other hand, another adjuster is quite definite that Mr. Houston is unquestionably right.

While it must readily be conceded that the Courts here have made it abundantly clear that "seizure" includes *all* forms of seizure, it is noticeable that in all the relevant cases the issue was concerned with seizure by *third parties* and not with *barratrous* seizure by the master or crew. It is true that in *Cory* v. *Burr*, to which reference had already been made, the seizure of the vessel resulted from the barratrous act of the master in smuggling goods into Spanish territory, but it was held that the proximate cause of the loss was *seizure*—excluded by the F. C. & S. Clause—and *not* the barratry of the master. If *barratry* had been held to be the *proximate* cause, is it likely that the result would have been the same?

According to Arnould (12th Ed.) Sect. 859, where goods were seized in consequence of the captain's barratrous breach of blockade, it was held that the foreign sentence by which they were condemned as enemy's property could not prevent the plaintiff from recovering as for a loss by "bar-

ratry"; for, "even if the sentence were conclusive of the fact of enemy's property, still it was by the barratrous act of the captain that the goods assumed that character." (*Goldschmidt* v. *Whitmore*, 1811.) It seems to me that if the policy did not contain an exclusion of capture or seizure, there would have been no point in bringing the case as clearly, the loss would have been recoverable as a loss by barratry. On the other hand, if the policy did incorporate such an exclusion then surely the case establishes my point.

It is suggested by Mr. Houston that, since "piracy" is an insured peril, and that no one would question that piratical seizure is not excluded by the F. C. & S. Clause, then likewise *barratrous* seizure must also be excluded. That is certainly fair comment, but pirates are outsiders and not members of the crew, and my distinction has been between third parties and the owners' own servants. In any case, if it was so obvious that seizure by pirates was automatically excluded by the operation of the F. C. & S. Clause, why did underwriters specifically include "piracy" as a "war" risk by transferring it to the F. C. & S. exclusions during the Spanish Civil War?

Not So Simple

Although the intention of a clause is not material if the words used do not admit of ambiguity, it is none the less interesting to note that, according to Arnould, the F. C. & S. Clause was introduced into the policy during the Napoleonic war, when almost all the ports of the Baltic were in a state of occasional hostility to this country, and the adventurous expeditions to those seas were undertaken without any fixed destinations. Thus it became frequent for underwriters to insert a stipulation that they should not be answerable for the risk of capture, seizure, or confiscation in the ship's port of discharge, or in port or ports generally. The intention was clear, therefore, and that was to exclude from the policy capture or seizure by hostile governments, factions, or

peoples, and certainly not to restrict the cover under the head of "barratry of the master or mariners."

If it is so patent that barratrous seizure is excluded by the F. C. & S. Clause it is astonishing that underwriters in this market have never adopted that line of defense. It is also rather singular that Mr. Houston should have been the only correspondent to take up the cudgels. I do not mean to imply by that that he is wrong in law—that would be presumptuous of me—but merely that the issue does not appear to be quite as simple as he would have it.

The Post Magazine & Insurance Monitor August 15, 1957

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Barratry and Seizure

From a more detailed account of the case to which I referred in my Notes for the 25th July, it appears that in the course of the United States District Court's judgment, the following statement was made by Chief Judge Thomsen:—

> "Could there be a seizure of a vessel by her master, officers or crew? In other words, could there be a *barratrous* seizure, or were the terms 'barratry' and 'seizure' mutually exclusive? In *Greene* v. *Pacific Mutual Insurance Company* (91 Mass. 217), it was held that the word 'seizure' cannot be applied to any barratrous act of the master. He has by law possession and control of the ship . . . He cannot be justly said to seize that which is already in his own keeping. The same is true to a certain extent of the mariners who have a qualified possession of the vessel . . . The word 'seizure' as applied to the contract of insurance, may be said to import the taking possession of a ship or vessel by *superior force, or by violence from without,*

and not a barratrous conversion of her by the officers and crew."

On the other hand, the report goes on, in *Kleinwort v. Shepard*, 1889 (one of the cases on which Mr. Houston relied in his criticism of my views), which involved a mutiny by coolie passengers, it was suggested that if the crew, intending to turn pirates, were to murder the master and run away with the ship, that might be a loss by seizure. *But the Judge said that he had found no case which had approved that dictum.*

If this report is accurate—and there is no reason to doubt it—it is a complete vindication of my argument.

The Post Magazine & Insurance Monitor June 12, 1958

MARINE INSURANCE Page 803

Barratry and Seizure

(From our Marine Correspondence)

In my Notes of 13/6/57 I drew attention to a decision of a United States District Court to the effect that the seizure of a vessel by her crew amounted to "seizure" within the meaning of the policy and was therefore an excluded risk under the Free of Capture and Seizure Clause. It seemed to me, however, that from the facts of the case it was reasonable to conclude that the loss was clearly a case of "barratry of the master and mariners" and thus recoverable under the standard form of policy as a loss by *barratry* notwithstanding the F. C. & S. exclusions. Further observations on the case were made in articles under date of 25/7/57 and 15/8/57.

In point of fact, there were, altogether, seven vessels involved in separate suits but it was agreed to try the actions concurrently in the District Court. The District Judge held that six of the vessels were lost by barratry

of the master and awarded damages in the sum of $2,995,270.87, the face value of the policies, with interest at 3 per cent. from the date liability was denied to the date of the decree, and interest at 6 per cent. from the latter date until paid. As to the seventh vessel, it was adjudged that the seizure of the ship by her crew was excluded from the cover afforded by the policy. My comments were confined entirely to the ruling given in the case of this seventh vessel, the "Hai Hsuan."

In the meantime, the seven cases have been before the United States Court of Appeals. The ruling of this Court, recently announced, affirms the judgment of the District Court with respect to the first six vessels but has reversed the judgment in the "Hai Hsuan" case, holding that the seizure of the vessel was an act of *barratry* and therefore covered by the policy notwithstanding the F. C. and S. Clause exclusions.

The essence of the higher Court's findings is that to constitute a "seizure" within the meaning of the F. C. and S. Clause there must be a forcible taking of possession from *without*, which would obviously exclude a *barratrous* seizure, barratry being confined to acts of the *master and/or members of the crew*. This is absolutely in line with the views expressed in my previous articles and an answer to those who considered my reasoning faulty and misleading, the Court of Appeals being unanimous in its decision.

Judgment

Delivering the judgment of the Court, Circuit Judge Soper referred to the opinion of Chief Justice Bigelow in *Greene* v. *Pacific Mutual Life Insurance Company*, 91 Mass. 217 (1864). In that case the owner of a whaling ship recovered from the insurance company for a loss sustained when the ship was taken from the command of the officers and the possession of the owner by a mutinous crew. The principal question considered by the court was whether the insurers were liable for the loss under the clause covering

"barratry of master or mariners" or were exonerated from liability under the clause by which the vessel was warranted "free from loss or expense arising from capture, seizure or detention." Underwriters defended on the ground that the evidence showed a "seizure" of the vessel by the mutinous acts of the crew, and in discussing this question the Court said:

> "... Barratry is one of the enumerated perils against which the defendants insured the plaintiff. This is a generic term which includes many acts of various kinds and degrees. It comprehends any unlawful, fraudulent or dishonest act of the master or mariners, and every violation of duty by them arising from gross and culpable negligence contrary to their duty to the owner of the vessel, and which might work loss or injury to him in the course of the voyage insured. A mutiny of the crew and forcible dispossession by them of the master and other officers from the ship is only one form of barratry. Now it is obvious, in a practical point of view, that no reasons existed for exempting this particular mode of committing the act from the general risk of barratry which the underwriters assumed . . . Nor is it reasonable to suppose that the parties, if they contemplated such a special warranty against a particular form or mode of committing an act of barratry, would have expressed it in language which, as applied to the subject-matter, leaves this meaning, to say the least, exceedingly doubtful and ambiguous. This consideration is of itself quite decisive of the construction which it is our duty to put on the policy declared on. Inasmuch as barratry is one of the risks assumed by the insurers, unless particular acts are clearly excepted in terms which leave no doubt as to their meaning, the general words of the policy must have full operation.
>
> "But we do not deem it necessary to put the decision of this point on so narrow a ground. Upon care-

ful consideration we are of opinion that the exception of a loss by seizure does not include the risk of mutiny of the mariners and the forcible taking of the ship from the control of the officers; or, in other words, that it does not properly exclude from the operation of the policy a loss by barratry. Certainly the word 'seizure' cannot be applied to any barratrous act of the master. He has by law possession and control of the ship. He may, it is true, take her out of her course, or convert her to his own use in violation or his duty to the owners. But he cannot be justly said to seize that which is already in his own keeping. The same is true to a certain extent, of the mariners. While in the discharge of their duty they have a qualified possession of the vessel. Subject to the order of the master, it is in their care and custody. If they violate their duty and disobey the master, displace him from command and assume entire control of the vessel, it is a breach of trust rather than a seizure (*Lawton* v. *Sun Insce. Co.*). It can be properly described only as barratry . . . *Indeed, the word 'seizure,' as applied to the contract of insurance, may be said to import the taking possession of a ship or vessel by superior force, or by violence from without, and not a barratrous conversion of her by the officers and crew, or either of them.* No adjudicated case can be found in which it has been interpreted to include an act of the latter character . . . The (policy) exemption is from liability for loss by reason of capture, seizure or detention. Capture and detention are both risks which can arise only from acts of persons having no connection with the ship, who take her out of the possession of the master and mariners forcibly, either without right or by the authority of law. The rule of interpretation, that words coupled together in the same sentence are to be understood and construed in *eodem sensu* warrants the conclusion that 'seizure' was intended to be understood as having reference to a similar class of

risks, and to exempt the insurers from liability for loss arising from a forcible taking of the vessel by others than the officers and crew . . ."

This decision, Circuit Judge Soper continued, had been repeatedly cited and the principles enunciated had been generally accepted by text-book writers on the subject of marine insurance. The Court of Appeals accepted this view of the law and agreed that if members of a crew violate their duty and disobey the master, displacing him from command and assuming entire control of the vessel, it was a breach of trust rather than a seizure.

"The Minden" Case Distinguished

For the respondent insurance company it was contended the closest case was *The Minden* (1942) A.C. 50, which concerned the action of a German master of a German vessel carrying British cargo at the beginning of World War II. Acting under orders of the German Government, the master scuttled the ship to prevent her capture by the British. The British court held that underwriters were liable under a cargo policy insuring against loss by "capture, seizure, arrest, restraint and detainments of all Kings, Princes and peoples." The respondents argued that the opinion of Lord Wright, characterising the action of the German master as a "seizure" of the British cargo, was unassailable authority for the proposition that a person in qualified possession of a thing, such as a master in charge of a ship, can "seize" it from the owner by merely changing the character of his possession.

In the view of the Court of Appeals, however, the decision in the case relied upon did not justify the conclusions drawn by respondents since it was directed to the relationship of the master to the owner *of the cargo*, which differed from his relationship of trust to the owner of the ship in that a breach of the latter amounts to a barratrous act within the coverage of the policy. There was no *barratry* in the case of *The Minden*.

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No. 154

In the Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, PETITIONER

v.

THE REPUBLIC OF CHINA, CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R.[1] 4–54) is reported at 151 F. Supp. 211. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. A1–A19) is reported at 254 F. 2d 177.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1958. The petition for a writ of certiorari

[1] "R." refers to petitioner's appendix in the Court of Appeals.

was filed on July 5, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the actions of the masters and crews in taking control of certain ships owned by the Chinese Nationalist Government and holding them for the Chinese Communist Government constituted "barratry" rather than "seizure" as those terms were used in the insurance contracts covering those vessels.

STATEMENT

This action consolidates seven suits in admiralty brought to recover the proceeds of marine insurance for the value of seven ships which had been sold, subject to mortgages, by the United States to the Nationalist Government of China, and subsequently lost by the defection of their masters, officers, and crews (Pet. App. A1). Before their loss, the ships had been operated by the respondent China Merchants Steam Navigation Company (CMSN), a governmental corporation of the respondent Republic of China (Nationalist Government). The insurance contract covered losses due to "barratry of the masters and mariners" or to the "consequences of civil war," but excluded losses resulting from "capture and seizure." The District Court held that six of the ships were lost by "barratry" and the seventh by "seizure." (Pet. App. A2.) The Court of Appeals held that the loss of all seven ships was the result of "barratry."

The facts of the case, fully developed in the opinions of both courts below, may be summarized as follows:

Historical background

After World War II, communist armies dominated northern China, and in 1949 drove southward. By December 9, 1949, the mainland was largely in control of the communist forces, and the Nationalist Government had been forced to withdraw to the Chinese province of Taiwan, where it established its capital at Taipei. Since that time it has continued to operate on Taiwan as a sovereign entity. It is recognized by the United States as the only proper and lawful government of China and its officials are the accredited representatives of the Republic of China in the United Nations. (Pet. App. A3.) The British Government, as of midnight January 5 6, 1950, recognized the Communist Government as the de jure government of the Chinese mainland, at the same time withdrawing recognition of the Nationalist Government as a de jure government (Pet. App. A4).

The ships

The seven ships involved in this case were sold in 1946 and 1947 to "the Government of the Republic of China" (the Nationalist Government's official title) by the United States, subject to preferred ship mortgages securing the unpaid balance of the purchase price. As a result of defaults occurring in October 1949, the United States acquired the right to retake the vessels. (Pet. App. A2–A3.)

After the ships were acquired they were operated through a Nationalist Government agency, which, in September, 1948, was organized as a government-owned corporation called the China Merchants Steam

Navigation Company, Ltd. (CMSN). Its main office is in Taipei, with a branch office at Hong Kong. Petitioner recognized CMSN as the Nationalist Government's representative and transacted insurance business relating to the seven ships through that agency. The port of registry of each ship has been, since the latter part of 1949, a port on Taiwan. (Pet. App. A4.)

The insurance

The insurance policies covering the seven ships were issued in the names of "the Government of the Republic of China represented by Universal Trading Corp." on various dates in 1949, for amounts ranging from $342,375 to $550,000. Losses were payable to the United States for distribution to itself and the Nationalist Government as the interest of each might appear. (Pet. App. A4–A5.) Petitioners knew that the head office of CMSN had been transferred to Taipei and, of course, were aware of the civil war in China and of the competing interests involved in that conflict (R. 9, 29).

The insurance contract contained marine-risk and war-risk coverage.[2] Marine-risk coverage insures against losses resulting from, *inter alia*, "Barratry of

[2] In this case the term "contract" is used in a general sense to describe a hodge-podge of policies, warranties, and riders, the construction of which "requires a skill not unlike that called for in the decipherment of obscure palimpsest texts." See *Calmar S. S. Corp.* v. *Scott*, 345 U. S. 427, 432. For the sake of descriptiveness and simplicity we refer to "marine-risk coverage" and "war-risk coverage" under the all-encompassing "insurance contract." The jargon of marine insurance, however, describes these coverages as the "marine-risk policy" and the "war-risk policy."

the Master and Mariners," but excludes losses "resulting from capture, seizure, arrest, * * * all consequences of hostilities," etc. (Pet. App. A5, R. 239–41). The war-risk coverage is expressly designed to provide for those warlike risks excluded from marine-risk coverage, including the "consequences of civil war" (Pet. App. A5, R. 241–42). However, the war-risk coverage in this case was limited by the typewritten clause: "Excluding Capture and Seizure" (Pet. App. A5, R. 242). Originally, the policies did not contain this exclusion but instead limited the ports in China at which the ships could touch, so as to avoid the danger of capture by the communist forces. But with the increasing scope of Communist control in 1949, the area limitation proved inadequate and the clause "excluding capture and seizure" was added, for the obvious purpose of excluding from coverage the risk of capture by the communist forces. (Pet. App. A5.)

The loss of the ships

A. The Hong Kong vessels

Six of the ships in this case were moored in Hong Kong harbor when the events here involved occurred, and have been referred to by both courts below as the Hong Kong vessels.

Beginning on November 13, 1949, with the communist threat becoming more and more imminent, the CMSN general manager at Taipei sent frequent messages to the Hong Kong branch office and to the officers and crews of the ships, ordering the ships to proceed to Taiwan or other designated ports (Pet. App. A6). The ships' personnel, who had been dis-

cussing among themselves the question of what course to follow, ignored these orders because, for various reasons, they were inclined to avoid alliance with the nationalist cause in view of the existing state of affairs (Pet. App. A6, R. 13–14). The head office continued to provide money for wages and supplies, and offered certain inducements to return to Taiwan (Pet. App. A6, R. 14–15). On January 13, 1950, the manager and most of the employees of the CMSN branch office at Hong Kong publicly defected to the Communist Government. The main office, however, remained loyal to the Nationalist Government and there was nothing to prevent the ships from leaving the harbor other than the unwillingness of the masters and mariners to obey the orders of the main office. Two nationalist ships other than the six did sail to Taiwan. (Pet. App. A6.) Communist artillery dominated Hong Kong harbor but the Communist Government did not, by proclamation or otherwise, purport to take over CMSN or any ships in foreign ports (Pet. App. A6–A7).

On January 16, 1950, the master of each ship raised the flag of the Communist Government, without opposition by the crew. The personnel of the Hong Kong CMSN office, having already defected, had purported to give orders that the flags be changed, but it is clear that the actions of the masters in doing so were not inspired by this order; the masters had previously reached an agreement among themselves to follow this course. The action of each master was the result of "his own deliberate decision." (R. 16.) Immediately after the defection, the United States, the Na-

tionalist Government, and CMSN made every reasonable effort to recover possession of the ships, but these efforts proved unavailing (R. 20–22).

B. The Hai Hsuan

The Hai Hsuan was on the Indian Ocean en route to Japan at the time of the British recognition of the Communist Government and at the time of the defections in Hong Kong (Pet. App. A7, R. 16–17). These events became known to the ship's company through British radio broadcasts. The master received radio messages from the CMSN main office at Taipei ordering him to avoid all British ports and to proceed directly to Taiwan. He was anxious to comply, but was opposed by the officers and crew, led by the chief engineer. (Pet. App. A7.) A radio message from the communist-controlled Hong Kong CMSN office purported to direct the ship to proceed to Singapore, and the officers and crew held a meeting to decide which orders to follow (Pet. App. A7). The master informed the gathering that only his orders should be obeyed, and left orders to proceed past Singapore without stopping (R. 17–18). However, when the ship was about 30 miles west of Singapore the engines were stopped by the crew. The master, several days without food and physically sick with fear, radioed the CMSN main office, stating that he was sick in bed and asking instructions (R. 18). In reply, the main office, unaware of the situation aboard the ship, instructed the chief officer to assume command and proceed to Taiwan. Instead he put into Singapore on January 24, and on January 26, with the master

in a hospital ashore, the communist flag was raised over the ship. As in the case of the six Hong Kong vessels, subsequent attempts to regain control of the ship proved unavailing. (Pet. App. A5.)

Proceedings below

The respondents, after demand for payments, sued for the proceeds of the insurance in the United States District Court for the District of Maryland. The District Court held, after trial, that respondents were entitled to recover for the loss of the six Hong Kong vessels, ruling that the circumstances relating to the loss of those vessels did not amount to a "seizure" (R. 44–45). However, recovery was denied in the case of the Hai Hsuan, on the ground that the circumstances relating to the loss of that ship did constitute a "seizure" (R. 45).

The Court of Appeals affirmed as to the six Hong Kong vessels. However, it reversed the judgment of the District Court in the case of the Hai Hsuan (Pet. App. A13–A14).

ARGUMENT

It is clear, as held by the court below, that the actions of the masters and crews of the ships involved in this case fall within the accepted definition of "barratry": *i. e.*, a breach of duty to the owners of a ship by its master or crew, regardless of motivation (see Pet. App. A8–A13). Equally clear is the understanding of underwriters of marine insurance that according to recognized authority "the word 'seizure' cannot be applied to any barratrous act of the master" or to the mutiny of the crew. See *Greene* v.

Pac. Mut. Ins. Co., 91 Mass. (9 Allen) 217, 221; Pet. App. A13.[3] Since the facts of this case fit so neatly into the well-settled definitions of what "barratry" is and what "seizure" is not, it is, of course, unnecessary to a decision of the case to define what "seizure" is. The cases cited by petitioner as being in conflict with the decision of the court below are demonstrably not in point. Finally, review by this Court of the decision below would not be appropriate because the prospective importance of that decision is limited by the unique facts of the case and because the effect of the decision may easily be nullified or avoided by the petitioner and other underwriters by a simple clarification of the typewritten exclusionary clause which gave rise to this dispute.

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[3] Both courts below considered that the sole question was whether this was a case of "barratry" (within its generally accepted meaning) or "seizure." Petitioner, however, now raises the argument that, within the context of this case, "barratry" has an unusual, limited meaning (Pet. 28-32). This argument is based upon a distinction between the marine-risk and the war-risk coverage. The former expressly includes "barratry"—obviously in its broad, generally accepted sense. The latter includes barratry only by implication, and thus, petitioner contends, limits the concept to warlike acts. But even if this purported distinction is one of substance, which we do not concede, it is a distinction of no significance for the purposes of deciding the present case. Both marine-risk and war-risk coverage were placed with the same company, as is customary, so as "to avoid the trouble some questions that arise so often when the two policies are issued by different insurers." (R. 10.) Even if the barratry contemplated under the war-risk coverage is a limited concept, the petitioner insurer remains liable, under the marine risk coverage, for "barratry" as that term is generally used. Thus it is obvious that there is no reason, in this case, to pass upon the distinction upon which petitioner places so

1. Well-established precedents have endowed the terms "barratry" and "seizure" with meanings which, without further elaboration, are dispositive of this case. The generally accepted definition of "barratry" is set forth at length, with supporting authorities, in the opinion of the District Court (R. 26–27), and is quoted in the opinion of the Court of Appeals (Pet. App. A8–A9). Briefly, "barratry" is defined as a breach of duty toward the owner of a ship by its master or crew, regardless of motivation. The actions of the masters of the six Hong Kong vessels and of the crew of the Hai Hsuan clearly fall within this definition. Thus, there remains only the question whether these actions might also be defined as "seizure." In answering this question it is, fortunately, unnecessary to offer a comprehensive explanation of what "seizure" is, because this case fits neatly into a well-settled rule as to what "seizure" is not. That rule was laid down in the venerable case of *Greene* v. *Pac. Mut. Ins. Co.*, 91 Mass. (9 Allen) 217. In that case the owner of a whaling ship recovered from the insurer for the loss of the ship resulting from the mutiny of the crew. The insurer defended on the ground that the mutinous actions of the crew, in wresting control from the officers by force and violence, constituted "seizure." In holding for the

much emphasis. It is true that the District Court observed, in dictum, that the losses in this case were covered by the war-risk clause, but it noted that "the question is important only because there were different re-insurers." (R. 46.) In other words, petitioner is asserting, as a reason for the granting of its petition, a potential conflict with re-insurers, who are not parties to this suit.

owner, the court reasoned that "the word 'seizure' cannot be applied to any barratrous act of the master" or to the mutiny of the crew, but that such conduct can only be described as "barratry." 91 Mass. (9 Allen) at 221. As both courts below pointed out, the *Greene* case has been repeatedly cited with approval by text writers in the United States. (See R. 39, 44; Pet. App. A13; 5 Appleman, *Insurance Law & Practice*, Sec. 3256, note 37, p. 400 (1941); 1 Parsons, *Law of Marine Insurance*, p. 584 (1868); 1 Phillips, *Insurance*, p. 652 (5th ed., 1867); *Richards On Insurance*, p. 834 (4th ed., 1932).) And as the Court of Appeals observed, the case "has become familiar knowledge to underwriters of marine insurance and their technical advisers." (Pet. App. A13; see also R. 44.) It establishes the rule that any act of a master or crew of a ship, in breach of the duty of both to the owner, constitutes "barratry" and cannot be deemed a "seizure." It must, of course, be presumed, generally, that parties to marine insurance contracts contemplate the applicability of this well-settled rule to their transactions. And in the present case there is certainly no evidence indicating any unusual understanding or intent of the parties with regard to these well-established precedents.[4]

Indeed, the circumstances of the case indicate that the addition of the clause, "excluding capture and seizure," was solely a response to the increasing possi-

[4] Any doubts as to this matter must, of course, be resolved against the insurer. *Calmar S. S. Corp. v. Scott*, 209 F. 2d 852, 856 (C. A. 2); *Marine Ins. Co. v. McLanahan*, 290 Fed. 685, 688 (C. A. 4).

bility, in 1949, of a physical taking of the ships by communist forces. This conclusion is based on the fact that this exclusionary clause supplemented successive provisions which relieved the insurer of liability for losses resulting from voyages to certain communist-controlled ports. As the communist area of conquest was extended, such area limitations did not keep up with events and thus proved inadequate. Accordingly, it became necessary to add the comprehensive clause, "excluding capture and seizure." In light of its background, the purpose of the exclusionary clause was, in the words of the Court of Appeals, "obviously to avoid capture by the communist forces" (Pet. App. A5), and not to relieve the insurer from losses resulting from the barratrous acts of the masters or crews.

2. The two English cases cited by petitioner (Pet. 33–38) as being in conflict with the decision in the instant case are not in point. *The Minden* (*Rickards* v. *Forestal Land, Timber and Railways Co., Ltd.*) [1942], A. C. 50, involved a German ship carrying British cargo at the beginning of World War II. Acting under orders of the German Government, the master attempted to take the ship and cargo to a German port and then scuttled it to prevent capture by the British. The House of Lords held that the insurance company was liable under a cargo policy insuring against loss resulting from, *inter alia*, seizure, and could not seek refuge under a certain exclusionary clause upon which it relied. The decision clearly deals only with the relationship of the master to the owner of the cargo, which differs markedly from his relationship to the owner of the ship. There was no

question of "barratry" in *The Minden* because "barrarty", by definition, can be committed only against the owner of a ship. Thus, although the case appears to state that a master can "seize" a cargo, there was certainly no occasion to pass upon the question decided by the instant case and by *Greene, viz.*, whether the *barratrous* acts of a master can constitute "seizure."

Cory v. *Burr*, 8 App. Cas. 393 (1883), is similarly inapposite. In that case the captain of a ship, in violation of his duty to the owners and in furtherance of his own interests, used the vessel in smuggling, which activity eventually resulted in a seizure by government authorities. The basic question considered was the proximate cause of the loss, which was held to be the government seizure rather than the master's barratry. But in the instant case there is no question of causation since, as the Court of Appeals noted, the loss "was brought about by the voluntary acts of the masters and crews in possession and was not compelled by the superior forces of the Communist Government." (Pet. App. A15.)

Petitioner also contends that the decision below conflicts with the principle enunciated by this court in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, that "the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it." 304 U. S. at 137. From this principle petitioner argues (Pet. 32–33) that the actions of the masters and crews in this case could not constitute "barratry" because ownership of the ships was vested in the Communist Government.

There are two separate answers to this argument. First, it is well settled, as this Court recognized in *Guaranty Trust*, that the State Department's recognition of a foreign government is conclusive in all courts in this country. Accord, *United States* v. *Pink*, 315 U. S. 203, 229–30. It follows that, in so far as our courts are concerned, the Nationalist Government is the only sovereign to which the masters and crews owed political allegiance, and that the Communist Government could not have acquired any legal rights to the ships.[5] Secondly, petitioner was well aware that the ships were owned by and registered in Taiwan in the name of the Nationalist Government, which was engaged in a civil war with the Communist Government. The policies were issued in the name of and premiums were accepted from the Nationalist Government. Petitioner cannot now be heard to say

[5] This observation disposes of possible conflict with *Guaranty Trust* v. *United States*, *supra*. However, petitioner incorporates in its argument from that case the additional suggestion—really a separate argument—that the six ships in Hong Kong harbor were subject to British law and that under this law the masters owed political allegiance to the Communist Government. But even if this were so, which we dispute, it would not follow that the masters' actions did not constitute "barratry," because, for the purposes of that concept, the crucial relationship is not citizen vis-à-vis sovereign but rather employee vis-à-vis employer. It is the violation of the duty of an employee which constituted "barratry" by the masters. That they were employees only of the Nationalist Government is beyond dispute. The voluntary termination of that relationship in such a manner as to cause the loss of the ships by the employer is, of course, a breach of duty constituting "barratry," regardless of whether it can realistically be said that the masters thereupon became "agents" of the Communist Government.

that the ships were not owned by the Nationalist Government. To do so is an attempt, in effect, to repudiate its contract.

3. Finally, this case does not present an issue which requires consideration by this Court. In the first place, the case turns upon the interpretation of language in an insurance contract, which language easily may be altered by petitioner and other underwriters so as to nullify or avoid the decision below or any decision which this Court might reach. The ease of effecting such an alteration is evidenced by the fact that the exclusionary clause which gave rise to the dispute in this case is itself a typewritten clause which the parties added to the usual printed contract. As the District Court so aptly noted (R. 42):

> If the insurer had feared the masters and mariners of the ships themselves, as well as the communist gunboats and port officials, and had wished to be free of the risk of defection by the masters and mariners, the insurer could have excluded barratry from the risks assumed, or could have inserted a clause clearly excluding a loss caused by the defection of masters or the mariners.

In addition, there is no need for clarification of the definitions of the words "barratry" and seizure." As we have indicated above (pp. 10 to 11), the meanings of those terms, at least for the purposes of this case, are well settled. The application of those definitions to the unique set of facts involved in this case does not merit further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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